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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 792

NATIONAL LABOR RELATIONS BOARD,
Respondent,

vs.

MONTEREY COUNTY BUILDING & CONSTRUCTION TRADES COUNCIL,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

LOUIS SHERMAN,
1200 - 15th Street N. W.,
Washington, D. C.,
Attorney for Petitioner.

P. H. MCCARTHY, JR.,
593 Market Street,
San Francisco 5, California,
Of Counsel.

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Monterey County Building and Construction Trades Council prays that a writ of certiorari issue to review the decree of the Ninth Circuit filed and entered August 18, 1963, petition for rehearing denied October 1, 1964.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 335 F.2d (no. 4) 927. (Infra, Appx. A, pp. 1-9.) The decision of the National Labor Relations Board is reported at 142 NLRB No. 18. (Infra, Appx. B, pp. 10-17; infra, Appx. B1, pp. 18-56.)

JURISDICTION

The decree of the Court of Appeals was entered on August 18, 1964 (infra, Appx. C, pp. 59-63), a petition for rehearing was filed on September 14, 1964, the petition for rehearing was denied on October 1, 1964 (infra, Appx. C, pp. 57-58).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

Whether the employees involved were "Agricultural Laborers" within the meaning of Section 2(3) of the National Labor Relations Act (29 USC 152(3)) (infra, Appx. F, p. 68) and the 1962 Appropriation Act for the National Labor Relations Board (Title III, Act of August 2, 1961, Public Law 86-290, 87 Congress, First Sess. (infra, Appx. D, p. 64) as defined in Section 3(f) of the Fair Labor Standards Act (29 USC 203(f)) (infra, Appx. D, pp. 64-65) and therefore the National Labor Relations Board was without jurisdiction.

Whether if as petitioner contends the individuals employed are Agricultural Laborers petitioner could violate Section 8(b)(7)(c) or 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act (29 USC 158 (b)(7)(C), 158 (B)(4)(i) and (ii)(B)). (Infra, Appx. F, pp. 6-8; Appx. G, 69-71.)

STATUTES INVOLVED

Section 2(3) of the National Labor Relations Act, as amended (61 Stats. 136, 29 USC Sec. 152(3)), provides that "The term 'employee' . . . shall not include any individual employed as an agricultural laborer . . ."

Section 8(b)(7)(C) of the National Labor Relations Act, as amended (29 USC Sec. 158(b)(7)(C)), provides that "it shall be an unfair labor practice for a Labor Organization or its agents:

> "(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees. . . .
>
> * * * * *
>
> "(C) where such picketing has been conducted, or petition under section 159(c) of this title being filed within a reasonable period of time

not to exceed thirty days from the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c)(1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof . . ."

Section 8(b)(4)(i) and (ii)(B) (29 USC Sec. 158 (b)(4)(i) and (ii)(13)) provides, "It shall be an unfair labor practice for a Labor Organization or its agents:

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * * *

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative

of such employees under the provisions of section 159 of this title; . . ."

The National Labor Relations Board Appropriations Act (Title III, Act of Aug. 2, 1962, Public Law 86-290, 87th Congress, First Sess.) provides that:

". . . Provided, That no part of this appropriation shall be available to organize or assist in organizing agricultural laborers or used in connection with investigations, hearing, directives, or orders concerning bargaining units composed of agricultural laborers as referred to in section 2(3) of the Act of July 5, 1935 (29 U.S.C. 152), and as amended by the Labor-Management Relations Act, 1947, as amended, and as defined in Section 3(f) of the Act of June 25, 1938 (29 U.S.C. 203), and including in said definition employees engaged in the maintenance and operation of ditches, canals, reservoirs, and waterways when maintained or operated on a mutual, non-profit basis and at least 95 per centum of the water stored or supplied thereby is used for farming purposes."

The Fair Labor Standards Act, Section 3(f) (29 USC 203 (f)) provides that:

"(f) 'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a

farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."

STATEMENT

The Factual Background

The Charging Party, Vito J. LaTorre is a chicken farmer (Tr. p. 22, LL 8-9) and has been for fourteen (14) years (Tr. p. 49, LL 18-19).

He owns jointly with his wife and operates four (4) poultry farms. The LaTorre Poultry Farm located at Boulder Creek, California, the Watsonville Farm, The Armous (Aromas) Ranch, and the fourth farm The Elkhorn Ranch; the last three farms are located at Watsonville, California. (Tr. p. 22, L 2 to p. 24, L 10.)

These farms make up the LaTorre family Chicken Farming operation which is one single operation entirely owned by Vito J. LaTorre. (Tr. p. 23, L 9 to p. 34, L 5; p. 49, L 3 to p. 53, L 3; p. 60, L 22 to p. 61, L 1; p. 67, L 13 to p. 71, L 7; p. 73, L 1 to p. 74 L 6; p. 138, L 10 to p. 140, L 6; see also paragraph 6 General Counsel's Exh. Appx. F.)

The only business engaged in by Vito J. LaTorre at all his ranches is chicken farming for his and his wife's own account.

He does not hatch chickens, raise (feed) chickens, sell chickens, process chickens or store grain or feed or perform any service for any other farmer, person,

or entity not 100% owned and controlled by him and his wife. (Tr. cites supra.)

The two farms directly involved in this proceeding are The Elkhorn Ranch (R. 18 et seq., Tr. p. 29, LL 4-7) and The Armous (Aromas) Ranch (Tr. p. 116, L 5 to p. 117, L 4; p. 137, L 2 to p. 141, L 11).

The places picketed were The Elkhorn Chicken Farm and The Armous (Aromas) Chicken Farm. (Tr. cites supra.)

The employers picketed were Jack L. Whiteside and Buckeye Builders. (R. pp. 21-22, para. VIII.)

Buckeye Builders never at any time had any of its own employees, as distinguished from supervisory personnel, working on The Elkhorn Ranch during the period involved in this proceeding. (Tr. p. 292, LL 1-22.)

Buckeye Incubator Division employees worked on The Elkhorn Ranch installing and servicing Buckeye Incubator Division equipment. (Tr. p. 361, LL 20-24.) These employees were regular employees normally employed in installing poultry raising equipment. They also service various ranches in the vicinity and that is their regular occupation. (Tr. p. 445-A, L 12 to 446, L 20.)

The work which Buckeye Builders is and has been performing on The Elkhorn Ranch through its labor contractor, Whiteside, is being done under oral agreement with the LaTorres. (Tr. p. 431, LL 3-7.)

Whiteside was on The Elkhorn Ranch as a labor contractor from August, 1961, to November 30, 1961,

under an oral agreement with Buckeye Builders. This was replaced by a written agreement November 30, 1961 (G. C. No. 5) which in turn was replaced by an oral agreement on January 2, 1962. (Tr. p. 292, L 22 to p. 297, L 2.)

Whiteside acted as a labor contractor on no other jobs except on the LaTorre Ranches since 1961. (Tr. p. 418, L 12 to p. 419, L 23.) The Transcript page 419, line 19 reading "1962" is in error; it should be 1961.

With respect to the construction of the chicken raising facilities at The Elkhorn Ranch the following stipulation was entered into by Robert M. Yates, Esq., counsel for The General Counsel, National Labor Relations Board, Samuel L. Holmes, Esq. of Angell, Adams, Gochnauer, Elder & Holmes, counsel for Vito J. LaTorre, the charging party, and P. H. McCarthy, Jr., Esq. of McCarthy, O'Hara & Johnson, counsel for the Respondent:

> "Mr. Yates. Mr. Trial Examiner, if Mr. McCarthy is pursuing this line because of his earlier statement on the matter of agriculture *I think we could stipulate that all of this material that was furnished from the Buckeye to Elkhorn was for the feeding and raising of poultry.*
>
> Mr. McCarthy. Oh, I think it is obvious that it is incidental to the raising of poultry, but I just thought we ought to have a complete record.
>
> Mr. Holmes. *We will stipulate that.*
>
> Mr. Yates. We will stipulate to that, the same as you stipulate on this machine here, we will stipulate that this was for the purpose of all of the machinery and equipment furnished.

Mr. McCarthy. Furnished by Buckeye?

Mr. Yates. Furnished by Buckeye.

Mr. Holmes. For hatching and raising chickens.

Mr. Yates. For the hatching and raising of poultry, feeding——

Mr. McCarthy. Including the large chicken coops called chicken houses?

Mr. Yates. That's what goes into the housing, feeding and raising of poultry.

Mr. Holmes. The brooder houses, the breeder houses, the hatchery, it is all consented to for the hatching and raising of poultry.

Mr. McCarthy. If it is all incidental to the raising of poultry, we are all in agreement on it. I don't know as there is much reason to pursue this particular aspect any longer. Are we in agreement, Gentlemen?

Mr. Yates. Yes.

Mr. Holmes. *That was the purpose of building all of the buildings and supplying the equipment on the ranch."*

(Tr. p. 219, L 9 to p. 220, L 15; emphasis added.)

For the purposes of this petition, it is conceded (1) that the purpose of the picketing was to force or require Whiteside and Buckeye to recognize and bargain with petitioner, and (2) that its picketing and related activities were designed to cause employers within the meaning of the National Labor Relations Act to cease doing business with LaTorre, Whiteside and Buckeye at the Elkhorn Chicken Farm and the Armous (Aromas) Chicken Farm.

REASON FOR GRANTING THE WRIT

THE EFFECT OF THE DECISION OF THE COURT OF APPEALS IS TO APPROVE THAT WHICH THIS COURT DISAPPROVED

The Court of Appeals for the Ninth Circuit has misinterpreted and misapplied *Farmers Irrigation Co. v. McComb,* 337 U.S. 755, 60 S.Ct. 1274, 93 L.Ed. 1672, rehearing denied 338 US 839, 70 S.Ct. 31, 94 L.Ed. 513 and *Mitchell v. Budd,* 350 U.S. 473, 76 S. Ct. 527, 100 L.Ed. 565 and has extended the coverage of the National Labor Relations Act and incidentally the Fair Labor Standards Act to the "threshing of wheat" and any and all other functions necessary to the farmer if they are performed on a farm by separate companies organized for and devoted solely to a particular job—contrary to the specific holding of this Court in *Farmers Irrigation Co. v. McComb* (supra) and *Mitchell v. Budd* (supra.)

The Court of Appeals says:

> "Were the persons employed by Buckeye and Whiteside 'agricultural laborers' within the exclusion of section 2(3) of the Act.
>
> "Although the Act does not define 'agricultural laborer', Congress has supplied a definition by adding a rider to the annual appropriation for the Board, which in effect provides for the use of the definition of 'agriculture' set forth in Section 3(f) of the Fair Labor Standards Act, 29 U.S.C.A. §203(f). See NLRB v. Olaa Sugar Co., 9 Cir. 1957, 242 F.2d 714, 715. This definition reads in pertinent part:
>
> '"Agriculture" includes farming in all its branches and among other things includes the

> cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities * * * the raising of livestock, bees, fur-bearing animals, or poultry, and any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations * * *.'
>
> "The Board concludes that the employees of Buckeye and Whiteside were not 'agriculture laborers' for two reasons: (1) the interpretation of the Fair Labor Standards Act by the Department of Labor, Wage and Hour Division, 'limits the agricultural labor exemption to persons performing work on a farm as an incident to or in conjunction with farming operations', and the term 'farm' is defined as 'a tract of land devoted to actual farming operations.' At the time of the commencement of the picketing, there were no active farming operations and the 'Elkhorn Ranch was still a tract of land not yet developed into a farm * * *'; and (2) the 'construction in itself, and not part of an agricultural function'."

and concludes:

> "While the exemption relating to agricultural laborers has been construed in many cases, no case has been found involving the precise situation here presented. The analysis of the provisions of the Act and the separation of functions recognized in Farmers Irrigation Co. v. McComb, supra, impel the conclusion that the 'agricultural laborer' exception is not applicable and that the employees of Whiteside and Buckeye are covered by the Act."

The rationale of the Court is expressed as follows:

"In construing Section 3(f) of the Fair Labor Standards Act in Farmers Irrigation Co. v. McComb, 1949, 337 U.S. 755, 69 S.Ct. 1274, 93 L.Ed. 1672, rehearing denied 338 U.S. 839, 70 S.Ct. 31, 94 L.Ed. 513, the Court said:

"Agriculture, as an occupation, includes more than the elemental process of planting, growing and harvesting crops. There are a host of incidental activities which are necessary to that process. Whether a particular type of activity is agricultural depends, in a large measure, upon the way in which that activity is organized in a particular society. The determination cannot be made in the abstract. In less advanced societies the agriculture function includes many types of activity which, in others, are not agricultural. * * * Economic progress, however, is characterized by a progressive division of labor and *separation of function.* * * * In this way, functions which are necessary to the total economic process of supplying an agricultural product become, in the process of economic development and specialization, *separate and independent productive functions* operation in conjunction with the agricultural function *but no longer a part of* it. Thus, the question as to whether a particular type of activity is agricultural is not determined by the necessity of the activity to agriculture nor by the physical similarity of the activity to that done by farmers in other situations. The question is whether the activity in the particular case is carried on as part of the agricultural function or is separately or-

ganized as an independent productive activity.' (Emphasis Court's) 337 U.S. at pp. 760-61."

* * * * *

"It is not the independence of the Elkhorn Ranch from the rest of the poultry operation which is in question; it is the fact that the Whiteside Construction Co. and Buckeye Incubator Company are organized separately from any farming or poultry operation and are engaged in a productive activity which is independent from any farming or poultry operations.

"It cannot be questioned that the Whiteside construction workers—carpenters, electricians, and plumbers—would be 'employees' within the terms of the Act, were they building a store, a church or even a home on a tract of land adjacent to the Elkhorn Ranch. Can they be said to lose this status and become 'agricultural laborers' because the construction project undertaken happens to form the basis for a farm? It does not appear to us that this construction of the Act would be consistent with the realities of our modern economy. As the Supreme Court said in Farmers Irrigation Company v. McComb, supra, 'Economic progress * * * is characterized by a progressive * * * separation of function'. These 'separate and independent productive functions (are) operated in conjunction with the agricultural function but (are) no longer a part of it.' The construction activity and the installation of the equipment, although necessary to the functioning of the poultry ranch, were done by organizations 'separately organized as an independent productive activity.'

"We recognize that a farmer might build a barn or silo or brooder house, using the laborers ordinarily and concededly employed as 'agricultural laborers', or he might hire individuals to assist in the erection of the particular structure. Where the work is done by persons who are not 'separately organized as an independent productive activity', the agricultural exclusion would be applicable. The determination is not dependent upon 'the physical similarity of the activity to that done by farmers in other situations'. Farmers do not ordinarily perform the functions of a construction project of the type involved here. Cf. Mitchell v. Budd, 1956, 350 U.S. 473, 481, 76 S.Ct. 527, 100 L.Ed. 565."

However, we submit that this rationale is directly contrary to this Court's decision in Farmers Irrigation Co. v. McComb (supra) in which this Court said at pages 766-767:

"The work of the company's employees is not, then, farming. *But coming to the second branch of the definition of agriculture, it is equally clear that it does constitute a practice performed as an incident to or in conjunction with farming.* If the Act exempted all such practices the company would be exempt. But the exemption is limited. *Such practices are exempt only if they are performed by a farmer or on a farm.*

"This language was carefully considered by Congress. As originally introduced, the exemption covered such practices only if performed by a farmer. *On the floor of the Senate it was ob-*

> *jected that this would exclude the threshing of wheat or other functions necessary to the farmer if those functions were not performed by the farmer and his hands, but by separate companies organized for and devoted solely to that particular job. To take care of that situation the words 'or on a farm' were added to the definition.* Thus, the wheat threshing companies, even though they were separate enterprises were included in the exemption because their work was incidental to farming and was done on the farm. In the face of this careful use of language, we are required to limit the exemption as Congress intended it should be limited, to practices performed by a farmer or on a farm. In the present case it is clear that the work of the petitioner's employees is done neither on a farm or [nor] by farmers." (Emphasis added; pp. 766-767.)

The separate function organized as an independent production activity must in addition be one which is generally and primarily performed off the farm.

This is particularly true when we consider the examples given in the part of the opinion relied upon by the Court of Appeals but omitted and replaced by asterisks in its opinion.

First Asterisks:

> "The fashioning of tools, the provision of fertilizer, the processing of the product, to mention only a few examples, are functions which, in some societies, are performed on the farm by farmers as part of their normal agricultural routine."

Second Asterisks:

> "Tools are made by a tool manufacturer, who specializes in that kind of work and supplies them to the farmer. The compost heap is replaced by factory produced fertilizers. Power is derived from electricity and gasoline rather than supplied by the farmer's mules. Wheat is ground at the mill."

The balance of the paragraph immediately following the portion quoted by the Court:

> "The farmhand who cares for the farmer's mules or prepares his fertilizer is engaged in agriculture. But the maintenance man in a power plant and the packer in a fertilizer factory are not employed in agriculture, even if their activity is necessary to farmers and replaces work previously done by farmers. The production of power and the manufacture of fertilizer are independent productive functions, not agriculture." (337 US at pp. 760-761.)

If the Court of Appeals is correct, then it appears to us that the Congressional intent to exclude, and we use this Court's example "The threshing of wheat" is no longer valid and such employees are covered by the National Labor Relations Act (supra).

We respectfully submit that if all construction in the future to be performed on a farm, if performed by others and not directly by the farmer's employees, is subject to the Fair Labor Standards Act (supra) and the employers and employees, assuming the Employer meets the jurisdictional standards, are covered by the National Labor Relations Act (supra), this

being a case of first impression, public policy requires a definitive answer by this Court.

Petitioner therefore respectfully submits that by ignoring the portion deleted from the quoted portion of this Court's opinion and the latter part of this Court's opinion in *Farmers Irrigation Co. v. McComb* (supra), the Court of Appeals has erred and enunciated a principle directly contradictory to that spelled out by this Court and in *Farmers Irrigation Co. v. McComb* (supra), and that under that decision the employees here involved like the employees employed in the threshing of wheat are agricultural laborers.

This conclusion is not modified by *Mitchell v. Budd* (1956), 350 U.S. 473, 76 S.Ct. 527, 100 L.Ed. 565 in which the Court found first it was an operation generally performed off the farm and second it was an operation in which the natural state of the tobacco was significantly changed citing *Maneja v. Waialua Agricultural Co.*, 349 U.S. 254, 260, 264-265, 75 S.Ct. 719, 99 L.Ed. 1040.

THE CONGRESSIONAL HISTORY SUBSEQUENT TO THE DECISION IN FARMERS IRRIGATION CO. v. McCOMB (SUPRA) CLEARLY EVIDENCES THE CONGRESSIONAL INTENT THAT THE AGRICULTURAL EXEMPTION IN THE NATIONAL LABOR RELATIONS ACT SHOULD BE BROADLY CONSTRUED

The decision in *Farmers Irrigation Company v. McComb* (supra) was rendered on June 27, 1949. The Appropriations Act for the National Labor Relations Board then in effect did not include in the proviso employees engaged in the work performed by the em-

ployees in *Farmers Irrigation Co. v. McComb* (supra). (Infra, Appx. E, p. 67 (1949).)

However, as a direct result of the decision in *Farmers Irrigation Co. v. McComb* (supra), the Appropriation Act of 1954 and such acts subsequent thereto added to the proviso and included in said definition employees engaged in the maintenance and operation of ditches, canals, reservoirs, and waterways when maintained or operated on a mutual, nonprofit basis and at least 95 per centum of the water stored or supplied thereby is used for farming purposes. (Infra, Appx. E, p. 67, (1953).)

Thus, insofar as the National Labor Relations Board's jurisdiction is concerned, that portion of the *Farmers Irrigation Co. v. McComb* (supra) was reversed by the Congress of the United States. The portion relied upon by Petitioner since it effected the Congressional intent remained untouched.

We respectfully submit that this expression of Congressional intent to keep the hand of the National Labor Relations Act off the farmer to the fullest possible extent requires that any doubt be resolved against the Board and in favor of the farmer and requires a holding that the employees in the instant case are agricultural laborers and without the jurisdiction of the National Labor Relations Board.

The Court of Appeals did not pass on the question as to whether or not the work was performed on a farm. However, the National Labor Relations Board's position on this issue is we submit erroneous.

THE WORK HERE INVOLVED WAS PERFORMED ON A FARM

The Board says "the evidence does not show that the Elkhorn Ranch was devoted to actual farming activities during the period pertinent to these proceedings". (R. p. 63.) (Infra, Appx B, p. 12.)

Presumably the Board is saying that during the period pertinent to this proceeding poultry was not being raised on the Elkhorn Ranch.

We submit that so limited and circumscribed a test is not the law and is not within the intent and scope of the Agricultural Exemption, Section 3(f) of The Fair Labor Standards Act and Section 2(3) of The Act.

This brings us to the question as to when a tract of land becomes a farm.

We submit that a tract of land one acre or ten thousand acres becomes a farm when a farmer who has purchased or leased it commences the preparation of that tract of land to produce an agricultural commodity or commodities, in this case poultry. The first act subordinate to the farming operation for which the tract of land was purchased or leased by the farmer performed by or for the farmer on the tract of land fixes its status as a farm.

Whether the farmer commences the preparation of that tract of land with the clearing of the land for cultivation, the felling of trees to prepare the timber for construction of his farm buildings, the building of an access road if the approach is by land or a dock if

the approach is by water, the terracing of the land, the leveling of the land, the construction of farm buildings including chicken coops now chicken houses, the digging of a well, or wells, the digging of drainage ditches, the building of a dam is immaterial.

They are "activities carried on as a part of the agricultural function". They are "actual farming activities" and "established part of agriculture" and are for the purpose of putting the LaTorre family in a better competitive position in the field of poultry farming and thus are "in competition with agriculture" and not "with industry".

This fact was stipulated to by all parties. (This Brief, pp. 4-5; Tr. p. 219, L 9-p. 220, L 15.)

We submit that such stipulations may not be summarily ignored as was done by the Board in the instant case.

The Homesteader was a farmer when he took up virgin land to farm and felled his first tree to build a lean-to even before he built his cabin or cleared a patch of land for his kitchen garden.

If the Board were correct we would have the anomalous situation in which the status of the employees would be dependent not on the nature of the work performed by them, contrary to *A. B. Kirschbaum Co. v. Walling,* 316 U.S. 517, 62 S.Ct. 1116, 86 L.Ed. 1638; *McLeod v. Threlkend,* 319 U.S. 491, 63 S.Ct. 1248, 87 L.Ed. 1538; *Johnston v. Cotton Producers Assn.* 244 F.2d 533, C.A. 5; *Wyatt v. Holtville Alfalfa Mills Inc.,* 106 F.Supp. 642, but on the act of LaTorre, i.e.

the delivery to the Elkhorn Ranch of a chicken or chickens to be raised.

Thus, if one chicken house was promptly finished and chickens placed in it all the employees on the Elkhorn Ranch would be "Agricultural Laborers" from that date on and exempt, but if LaTorre elected to wait until all the chicken farm buildings and appurtenances, i.e. wells, roads, etc. were completed and put in a caretaking crew for two weeks, none of the employees, including the caretakers, would be agricultural laborers.

We submit that this is not the law.

We submit that the Trial Examiner was correct when he found:

> "In general, work performed on a farm incident to the operation of a farm is within the agricultural exemption. It is immaterial whether the work is done directly for the farmer or an independent contractor. Employees engaged in building terraces, construction of granaries, or silos are agricultural laborers within the statutory definition of being engaged in employment practices on a farm. Poultry raising is within the statutory ambit of the agricultural exemption. Hence anomalous as it may seem, I find that under existing decisional precedent the carpenters, electricians, plumbers, and laborers employed by Whiteside, a labor contractor, were agricultural laborers while they were engaged in constructing buildings to be used by LaTorre in raising his own poultry. It is also found that the individuals employed by Buckeye to install the poultry feeding and raising equipment were agri-

> cultural laborers for the purpose of this proceeding. (R. p. 8, L 55-p. 9, L 9.) (Infra, Appx. B1, pp. 33-34.)

The fact is that all employees of the picketed employers employed on the Elkhorn and Armous (Aromas) Chicken Farm of LaTorre, were at all times material herein, "agricultural laborers". The fact is that the National Labor Relations Act as amended has and can have no application to either operation.

Whatever law may govern the conduct of the parties, it is not the National Labor Relations Act, as amended.

We are not here faced with a question of policy, i.e. should the Act be applied or should it not by reason of the diverse employment of the employees of Whiteside or Buckeye? Their employment was solely and exclusively as "agricultural laborers."

We are here faced with implementing a Congressional decision. Whether the Congressional policy of excluding situations such as exist in the instant case is wise or not is not for us to decide. The decision has been made for us.

All of the activities complained of took place at the Elkhorn and Armous (Aromas) Ranches, and all of the employees of the picketed employers involved in the Elkhorn and Armous (Aromas) Ranch picketing were "agricultural laborers" and hence the National Labor Relations Act as amended has no application and the National Labor Relations Board has no jurisdiction.

THE BOARD ERRED IN FINDING THAT RESPONDENT'S PICKETING VIOLATED SECTION 8(b)(7)(C) OF THE ACT

Section 8(b)(7)(C) of the Act proscribes picketing by a labor organization to obtain recognition by an employer of the picketing Labor Organization as the collective bargaining representative of his "employees". This proscription can by the terms of the section be eliminated by filing a timely petition for an election under Section 9(c) of the Act.

Since the employees of Whiteside and Buckeye are agricultural laborers within the meaning of the Act, they are not "employees" within the meaning of the Act and thus the primary element of Section 8(b)(7)(C) of the Act is missing and no violation is possible.

Section 8(b)(7)(C) contemplates a representation proceeding and an election under Section 9(c); however, since the employees of Whiteside and Buckeye are agricultural laborers and not "employees" within the meaning of the Act no such petition could be filed and it follows that picketing to obtain recognition as representative of "agricultural laborers" is not covered by Section 8(b)(7)(C) and Respondent could not violate the section.

THE BOARD ERRED IN FINDING THAT RESPONDENT VIOLATED SECTION 8(b)(4)(i) AND (ii)(B) OF THE ACT

To understand the effect of the amendment of Section 8(b)(4) by the Labor-Management Reporting and Disclosure Act of 1959, it is necessary that we

trace and consider the history of Section 8(b)(4) and Section 7 of the Act.

To trace the history of Section 8(b)(4), we must go to Section 7 and Section 8 of the National Labor Relations Act.

Section 7 of the Act, the almost forgotten genesis and heart of the National Labor Relations Act, sets forth in clear and concise language the right of employees covered by the Act to self organization and collective bargaining through representatives of their own choosing.

Section 8, absent Section 7, had and has no meaning since its sole and only purpose was to proscribe employer conduct which delayed, destroyed or defeated the exercise by employees of the rights guaranteed in Section 7.

When the Labor-Management Relations Act of 1947 was passed, it did two basic things.

First, it amended Section 7 of the Act to give employees covered by the Act the right to remain unorganized and to not collectively bargain.

Second, it placed and proscribed employer conduct in Section 8(a) and proceeded in Section 8(b) to proscribe organized employee conduct, i.e., union conduct which delayed, destroyed or defeated the right of refusal, i.e., the right of employees under Section 7 of the Act to remain unorganized, and limited the manner in which the affirmative rights of employees under Section 7 of the Act could be exercised.

Once again, absent Section 7 as amended, Section 8(a) and (b) are and would be meaningless.

Thus, the conduct proscribed in Section 8, whether it be 8(a) or 8(b), must be conduct affecting or involving employees of the primary employer within the meaning of and covered by the Act.

Thus, under Section 8(a) and 8(b) of the Act as amended by the Labor-Management Relations Act of 1947 unless the proscribed conduct in Section 8(a) and 8(b) affected or involved an employee or employees of the primary employer, within the meaning of the Act and covered by the Act, the acts of the employer or union, as the case may be, were lawful insofar as the Act was concerned and a fortiori as far as the Board was concerned.

The issue then for many years was not whether Section 8(a) and 8(b) could or could not be applied to situations which involved employees, who were not employees of the primary employer within the meaning of the Act, and not covered by the Act, and therefore entitled to none of the rights, both affirmative and negative, guaranteed by Section 7, but the extent of the proscription and the nature of the proscribed conduct.

Thus, we come to the "Loopholes".

As explained by Congressman Griffin, one of the authors of the amended Section 8(b)(4) here involved:

> "The Wagner Act in 1935 was intended to secure that freedom from coercion on the part of employers; the Taft-Hartley Act in 1947 was

intended to secure that freedom from coercion on the part of unions.

"The second fundamental principle is that the public and innocent third parties are entitled to some consideration and protection; accordingly, labor disputes should be confined insofar as possible to the principal, or primary, parties involved.

"The Taft-Hartley Act sought to implement this principle by outlawing secondary boycotts, jurisdiction strikes and other practices which inflict injury upon innocent third parties."

(Vol. II, p. 1567, Col. 2—Legislative History of The Labor-Management Reporting and Disclosure Act of 1959 (hereinafter referred to as L.H. 1959).)

"How does a secondary boycott work?

"Well, suppose that a union official considers that Company A is unfair. He may be unhappy with Company A because its employees voted not to join his union. That was the situation of the Endicott Church Furniture Co., of Warsaw, Ind.

"Or he may be unhappy because Company A will not sign a 'sweetheart contract' and force its employees to join without an election. That was the situation of the Coffee Transfer Co. where the Teamsters official bluntly said he 'didn't have time to fool around, and would have to organize from the top down.'

"Or the union official may be unhappy because the employees of Company A have joined another union. That was, and still is, the situation at the Burt Manufacturing Co., in Akron, Ohio, where

a boycott has been carried on because the Burt Co. employees elected to belong to the Steelworkers Union rather than the Sheet Metal Workers Union. That was the case in a New York hotel, where a boycott was carried on because the barbers belonged to one union instead of another.

"In these and many other cases, a secondary boycott was used. You might ask, how could it have been used if Congress intended to outlaw secondary boycotts? The answer is that over the past 12 years a few gaping loopholes have developed. *Our substitute bill is designed only to close up these loopholes.*

"For example . . .

"Third, however, if Company B just happens to be a railroad company or a subdivision of government, the union official can induce B's employees—as a group, or in any other way—to refuse to handle Company A's products—and the effect of the Act can be avoided because, under a technical interpretation, employees of a railroad are not employees within the meaning of the Act. *Our substitute would close this loophole—the Committee Bill would not.*"

(Vol. II, p. 1568, Col. 1, 2 L.H. 1959.) (Emphasis added.)

Thus, the purpose and intent of the 1959 Amendments were to prevent the employees of Company A, within the meaning of the Act and covered by the Act, from themselves applying pressure on their employer by secondary action against a railroad and its employees or to prevent secondary pressure being applied against the railroad by a union to compel action

by the employees of Company A, in violation of rights guaranteed them by Section 7 of the Act.

In other words, the loopholes were to be closed, but Section 8(a) and 8(b) were not to be cut loose from their dependence on, in fact, interdependence with Section 7 of the Act.

There was no attempt and no intention to write a Federal law of Secondary Boycott outside of and apart from the framework of the National Labor Relations Act. So to do would require a complete rewriting of Section 1, Findings and Policies of the Act. Since such was not the intent or purpose, the Labor-Management Reporting and Disclosure Act of 1959 made no change in Section 1 of the National Labor Relations Act.

However, the Labor-Management Relations Act of 1947 did amend Section 1 of the Act because of the fundamental changes which it made in Section 7 and Section 8 of the Act.

Thus, as expressed by Congressman Rhodes:

> "... *As I have said, the secondary boycott is primarily a method of using a secondary employer to thwart the sentiments of a majority of the employees of a primary employer.* It is used not only as a means of bolstering unsuccessful recognition strikes by a minority union but also to support unpopular strikes over economic issues, for obviously if a strike is successful in closing down the plant of a primary employer there would be no occasion to resort to a secondary boycott."
>
> Vol. II, p. 1581, Col. 2, L.H. 1959.) (Emphasis added.)

"Mr. Chairman, this analysis of the provisions of the Landrum-Griffin substitute dealing with the secondary boycott problem demonstrates that there is nothing in the language of Section 702 which infringes in any way upon legitimate concerted activity of labor unions. *The whole tenor of this section of the bill is to insure freedom of choice on the part of employees and to prevent their wishes from being frustrated by the pressure applied to their own employer by secondary employers, who are under the control of unions.*" (Vol. II, p. 1581, Col. 3, L.H. 1959.) (Emphasis added.)

Speaking of Secondary Boycotts, Senator Goldwater said:

"When the Taft-Hartley Act was enacted in 1947, it was the intent of Congress to do away with secondary boycotts. Evidently Congress at that time overlooked some important fact situations, leading to secondary boycotts—at least the Board and the Courts consider that we did—and these have been seized upon by those intent upon circumventing the law to achieve objectives otherwise prohibited by the Act.

"The biggest loophole in the present law is that it does not prohibit a union from using direct pressures upon an employer with the object of forcing him to cease using the products of, or to cease doing business with another person. If this objective is contrary to public policy, which it is, it is no less contrary to public policy to achieve it through one means rather than another.

* * * * * * *

"The present secondary boycott provisions of the Act also give no protection to railroads or

agricultural enterprises since they are excluded from the term employer as defined in the Act. ***Thus, unions which have stopped railroad employees, agricultural employees, and municipal employees from their normal activities in order to retaliate against some other employer have been immune from the Act.***"

(Vol. II, p. 1079, Col. 2, L.H. 1959.) (Emphasis added.)

Speaking of Secondary Boycotts as finally set out in the Labor-Management Reporting and Disclosure Act of 1959, Senator Kennedy said:

"Third. Secondary boycotts: *The chief effect of the conference agreement, therefore, will be to plug the loopholes in the secondary boycott provisions of the National Labor Relations Act.* There has never been any dispute about the desirability of plugging these artificial loopholes. The secondary boycott provisions of the House Bill would have curtailed legitimate union activities. Accordingly, the Senate conferees insisted that the report secure the following rights:

"(a) The right to engage in primary strikes and primary picketing even though the employees of other employers refused to cross the picket line.

"The fact of the matter is that there is some question under the Landrum-Griffin Bill whether employees of another employer could have properly refused not to cross a picket line in a primary strike. That has been clarified in the conference report."

(Vol. II, p. 1431, Col. 3; p. 1432, Col. 1, L.H. 1959.) (Emphasis added.)

Thus, the sole and only purpose of the amended Section 8(b)(4) was not to create new or different law but to plug loopholes in existing law.

Thus, unless the employees involved or affected are employees of a primary employer within the meaning of the Act, and are covered by the Act, Section 8(b)(4) can have no application.

Now, in the instant case, the employees of Whiteside and Buckeye, the primary employer, being agricultural laborers are not covered by the Act and have no rights, affirmative or negative, to be protected by the Act, by Section 7 of Section 8(b)(4), or any other section, nor has their employer.

Since they are not employees, they have no rights under Section 7 and are not protected by Section 8 (a) and (b). They stand insofar as this Act and Federal Law are concerned, naked to the attacks of their employer, any employer and any labor organization and subject only to state control.

The wisdom of this policy is not for us here to discuss. It is for Congress.

Thus, for example, if LaTorre sold his chickens to a processing plant in Salinas, and the employees of that plant, in a dispute with their employer, the primary employer, picketed the LaTorre Chicken Farm as a secondary employer to cut off the supplies of their employer, you would have a violation of Section 8(b)(4) by the employees of the processor, and the LaTorre employees would be protected, as would La Torre. Why? Because the employees of the proc-

essor have rights under Section 7 of the Act. They are employees within the meaning of the Act. They have correlative obligations set out in Section 8(b)(4) not to involve any other person whether employee, employer or not.

This, of course, is the fact situation, one of the loopholes which Section 8(b)(4), as it now stands was written to correct. Prior to the Labor-Management Reporting and Disclosure Act of 1959, such activity by the employees of the processor was not proscribed where the secondary employer and his employees were not covered by the Act. There was a loophole. That is one of the loopholes that was closed by Section 8(b)(4) of the Act, as it now stands.

In *Di Giorgio Fruit Corp. v. NLRB,* 191 F.2d 642, *cert. denied* 342 U.S. 860, the Court of Appeals in the instant case said:

> "At the same time, it must be pointed out that, as the effect of secondary boycotts upon farmers was discussed in Congress, the references were to the difficulties caused by the activities of teamsters, longshoremen, etc., and not to possible activities of agricultural workers. Thus, Senator Taft said:
>
> 'The trouble is that the man drives up to the delivery point, and because the teamsters' union says he does not have a teamster card, then the union in the plant, the unloaders, or longshoremen or whatever they may be, will not unload his truck. That is what we are trying to reach in this case.'
>
> "In this connection reference should also be made to the hearings before the House and Senate

Committees, in which the difficulties of farmers with boycotts were discussed. They show that Congress was concerned with activities of unions other than those consisting of agricultural workers, and did not specifically consider the latter group in this regard. The statute unquestionably protects farmers from secondary boycotts by organizations in which teamsters, etc., not classified as agricultural workers, participate. But that is not the question now before us."

(P. 645.)

* * * * * * *

"It seems clear from the legislative history as the Board says, that Congress meant to exclude agricultural laborers from the provisions of the Act . . ."

(P. 646.)

* * * * * * *

"As we have said in other similar cases, the problem here presented to us is essentially a legislative problem. Congress was undoubtedly concerned with the plight in which secondary boycotts place farmers; and it effectively protected farmers from the sort of boycotts which it then had in mind, boycotts by teamster unloaders, etc. At the same time, it seems indisputably clear that Congress did not intend to include within either the benefits or the restrictions of the Act organizations composed exclusively of agricultural laborers. There is nothing to tell us whether, if Congress had noted the problem of secondary boycotts against farmers by organizations of agricultural laborers, it would have decided it according to its policy in respect to agricultural laborers or would have decided it in accordance

> with its policy in respect to the protection of farmers, Congress did not in terms make such a boycott an unfair labor practice within the meaning of the statute and thus subject to statutory limitations and processes. . . . The ultimate problems whether secondary boycotts by agricultural laborers should be forbidden is for the Congress and not for the courts. We cannot decide what ought to be done in such a matter; our function is merely to ascertain what Congress has already done."
>
> (P. 647.)

The Congressional history supports the fact that "Congress", in the words of *Di Giorgio Fruit Corp. v. NLRB,* "was undoubtedly concerned with the plight in which secondary boycotts place farmers; and it effectively protected farmers from the sort of boycotts it then had in mind, boycotts by teamsters, unloaders, etc." by closing the loopholes in the Act which had been developed and exploited since its amendment in 1947.

We submit it did no more.

As that Court said:

> ". . ., it seems indisputably clear that Congress did not intend to include within either the benefits or the restrictions of the Act organizations composed exclusively of agricultural laborers.
>
> ". . . The ultimate problem whether secondary boycotts by agricultural laborers should be forbidden is for the Congress and not for the courts. We cannot decide what ought to be done in such

a matter; our function is merely to ascertain what Congress has already done."

Di Giorgio Fruit Corp. v. NLRB, supra, p. 674.

We submit that in the factual context of this record not only did respondent not violate Section 8(b)(4) in any respect, but that it could not have violated Section 8(b)(4).

If this be an unplugged loophole in the opinion of some, then it is a problem for Congress, and not the Trial Examiner, the Board, or this Court.

CONCLUSION

For the reasons stated this Petition for a Writ of Certiorari should be granted.

Dated, San Francisco, California,
December 21, 1964.

Respectfully submitted,
LOUIS SHERMAN,
Attorney for Petitioner.

P. H. MCCARTHY, JR.,
Of Counsel.

(Appendices Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

National Labor Relations Board, Petitioner, vs. Monterey County Building & Construction Trades Council, Respondent.	No. 19,053

[August 18, 1964]

On Petition for Enforcement of an Order of the National Labor Relations Board

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Before: JERTBERG and DUNIWAY, Circuit Judges, and JAMESON, District Judge

JAMESON, District Judge:

The National Labor Relations Board has petitioned for enforcement of a cease and desist order issued against the respondent, Monterey County Building and Construction Trades Council, on April 28, 1963. The Board found that respondent had violated (1) Section 8(b)(7)(C) of the National Labor Relations Act, 29 U.S.C. § 158(b)(7)(c), which proscribes recognitional picketing by a labor organization to force an employee "to recognize or bargain with a labor organization"; and (2) Section 8(b)(4)(i) and (ii)B

of the Act, 29 U.S.C., § 158(b)(4)(i) and (ii)(B), which proscribes secondary boycotts.

Respondent has not here attacked the Board's findings relative to the unfair labor practices, but contends that the employees involved were "agricultural laborers" and accordingly exempt from the provisions of the Act. Section 2(3), 29 U.S.C. §152(3) provides that, "The term 'employee' shall include any employee * * * but shall not include any individual employed as an agricultural laborer * * *."[1]

The charging party, Vito J. LaTorre, and his wife are the owners of all of the stock of three corporations operating poultry ranches in the Watsonville, California, area.[2] The Elkhorn Ranch, the site of the dispute, is not incorporated, but is owned equally by LaTorre and his wife. This ranch did not begin operating until early in the year 1962. The cost of the buildings and equipment exceeded one million dollars.[3]

Construction was started in 1961. In July, 1961, LaTorre contracted with Buckeye Incubator Company, a Delaware corporation primarily engaged in the manufacture of poultry equipment, for the construction of the buildings and equipment on the Elk-

[1]Respondent contends that this exemption barred the Board from finding that its activities were violative of either section 8(b)(7) or 8(b)(4).

[2]All do a substantial business. The largest grossed in excess of $400,000 in 1961 and employs between 30 and 50 persons.

[3]The construction project called for the erection of 42 "fryer" buildings, 380 feet by 40 feet, each housing 17,000 chickens; four brooding and two brooder houses, each housing 11,500 chickens, a hatchery capable of handling 20,000 eggs per day; and homes for two managers.

horn Ranch. Buckeye subcontracted the actual work of constructing the buildings to Jack L. Whiteside doing business as Jack L. Whiteside Construction Co., a labor contractor, and the electrical work to Sanders Electric Company Inc. Buckeye's own employees installed the poultry raising equipment. La Torre contracted with Granite Construction Company to perform the site preparation, grading and road work.

The employees of Sanders and Granite were represented by labor organizations which were constituent members of Respondent Council. Whiteside employed carpenters, plumbers, electricians and other laborers, none of whom were represented by any labor organization in connection with their employment with Whiteside.

On September 1, 1961, the secretary of Respondent Council requested Buckeye to execute respondent's standard labor agreement. Buckeye refused on the basis that Whiteside employed all the personnel within respondent's jurisdiction, and referred the secretary to Whiteside. Officers of Respondent Council approached Whiteside at the Elkhorn Ranch and asked him to sign the agreement. Whiteside refused, and picketing started on September 20, 1961.

Were the persons employed by Buckeye and Whiteside "agricultural laborers" within the exclusion of section 2(3) of the Act?

Although the Act does not define "agricultural laborer", Congress has supplied a definition by adding

a rider to the annual appropriation for the Board, which in effect provides for use of the definition of "agriculture" set forth in Section 3(f) of the Fair Labor Standards Act, 29 U.S.C.A. § 203(f). See NLRB v. Olaa Sugar Co., 9 Cir. 1957, 242 F.2d 714, 715. This definition reads in pertinent part:

> "'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities * * * the raising of livestock, bees, fur-bearing animals, or poultry, and any practices * * * performed by a farmer or on a farm as an incident to or in conjunction with such farming operations * * *."

The Board concluded that the employees of Buckeye and Whiteside were not "agricultural laborers" for two reasons: (1) the interpretation of the Fair Labor Standards Act by the Department of Labor, Wage and Hour Division, "limits the agricultural-labor exemption to persons performing work on a farm as an incident to or in conjunction with farming operations", and the term "farm" is defined as "a tract of land devoted to actual farming operations." At the time of the commencement of the picketing, there were no active farming operations and the Elkhorn Ranch was still a tract of land not yet developed into a farm * * *"; and (2) the "construction here appears to be a major independent construction in itself, and not part of an agricultural function".

It is clear that the exemption contained in section 2(3) of the Act was "meant to embrace the whole field of agriculture",[4] but "no matter how broad the exemption, it was meant to apply only to agriculture * * *", and it is necessary in each case to determine "what is and what is not properly included within that term". Maneja v. Waialua Agricultural Co., 1955, 349 U.S. 254, 260, 75 S.Ct. 719, 99 L.Ed. 1040. "A basic factor for determining what practices are incident to or performed in conjunction with a farmer's farm operations is whether the practices are among those ordinarily, customarily, or usually performed by a farmer or on a farm". Mitchell v. Hunt, 5 Cir., 1959, 263 F.2d 913.

In construing Section 3(f) of the Fair Labor Standards Act in Farmers Irrigation Co. v. McComb, 1949, 337 U.S. 755, 69 S.Ct. 1274, 93 L.Ed. 1672, rehearing denied 338 U.S. 839, 70 S.Ct. 31, 94 L.Ed. 513, the Court said:

> "Agriculture, as an occupation, includes more than the elemental process of planting, growing and harvesting crops. There are a host of incidental activities which are necessary to that process. Whether a particular type of activity is agricultural depends, in a large measure, upon the way in which that activity is organized in a

[4]On the other hand, it is equally clear that the National Labor Relations Act, like the Fair Labor Standards Act, was designed to include all employees not specifically excepted. Cf. Bowie v. Gonzales, 1 Cir., 1941, 117 F.2d 11, 18. As this court held in construing the Fair Labor Standards Act, the party claiming an exemption has the burden of proving that it comes within the exemption. Coast Van Line v. Armstrong, 1948, 167 F.2d 705, 707.

particular society. The determination cannot be made in the abstract. In less advanced societies the agriculture function includes many types of activity which, in others, are not agricultural. * * * Economic progress, nowever, is characterized by a progressive division of labor and *separation of function.* * * * In this way, functions which are necessary to the total economic process of supplying an agricultural product become, in the process of economic development and specialization, *separate and independent productive functions* operated in conjunction with the agricultural function *but no longer a part of it.* Thus, the question as to whether a particular type of activity is agricultural is not determined by the necessity of the activity to agriculture nor by the physical similarity of the activity to that done by farmers in other situations. The question is whether the activity in the particular case is carried on as part of the agricultural function *or is separately organized as an independent productive activity.*" (Emphasis added.) 337 U.S. at pp. 760-61.

Respondent argues that "the Elkhorn poultry farm was but an addition to the family's already extensive poultry farming operations—it was not an 'independent productive activity'. It was not 'major *independent* construction activity'. It was all part and parcel of the family poultry farming operations". This argument, however, misses the point. It is not the independence of the Elkhorn Ranch from the rest of the poultry operation which is in question; it is the fact that the Whiteside Construction Co. and Buck-

eye Incubator Company are organized separately from any farming or poultry operation and are engaged in a productive activity which is independent from any farming or poultry operations.

It cannot be questioned that the Whiteside construction workers—carpenters, electricians, and plumbers—would be "employees" within the terms of the Act, were they building a store, a church or even a home on a tract of land adjacent to the Elkhorn Ranch. Can they be said to lose this status and become "agricultural laborers" because the construction project undertaken happens to form the basis for a farm? It does not appear to us that this construction of the Act would be consistent with the realities of our modern economy. As the Supreme Court said in Farmers Irrigation Company v. McComb, supra, "Economic progress * * * is characterized by a progressive * * * separation of function". These "separate and independent productive functions (are) operated in conjunction with the agricultural function but (are) no longer a part of it". The construction activity and the installation of the equipment, although necessary to the functioning of the poultry ranch, were done by organizations "separately organized as an independent productive activity".

We recognize that a farmer might build a barn or silo or brooder house, using the laborers ordinarily and concededly employed as "agricultural laborers", or he might hire individuals to assist in the erection of the particular structure. Where the work is done

by persons who are not "separately organized as an independent productive activity", the agricultural exclusion would be applicable. The determination is not dependent upon "the physical similarity of the activity to that done by farmers in other situations". Farmers do not ordinarily perform the functions of a construction project of the type involved here. Cf. Mitchell v. Budd, 1956, 350 U.S. 473, 481, 76 S.Ct. 527, 100 L.Ed. 565.

We recognize also that the extent of mechanization and size of the particular farm does not preclude exclusion under the agricultural exemption where the operations are conducted by the farmer. See Maneja v. Waialua Agricultural Co., supra, where the Court held that persons who operated a railroad, hauling sugar cane from the fields to the processing plant, were within the agricultural exemption where the railroad was owned by the farmer, a large corporation, and operated on the plantation to haul the cane to the corporation's own mill. The Court also held, however, that workers employed in the maintenance of the village and repair of the dwelling houses owned by the corporate farmer but rented to the farmer's laborers were not within the agricultural exemption.

While the exemption relating to agricultural laborers has been construed in many cases, no case has been found involving the precise situation here presented. The analysis of the provisions of the Act and the separation of functions recognized in Farmers Irrigation Co. v. McComb, supra, impel the conclusion that the "agricultural laborer" exception is not

applicable and that the employees of Whiteside and Buckeye are covered by the Act.

The Board's findings with respect to respondent's unfair labor practices in violation of Sections 8(b)(7)(C) and 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act are supported by substantial evidence.

The Board's petition for enforcement of its order is granted.

Appendix B

United States of America
Before the National Labor Relations Board

Monterey County Building & Construction Trades Council and Vito J. La Torre, An Individual	Cases Nos. 20CC-285 20-CP-66-1 20-CP-66-2

DECISION AND ORDER

On August 22, 1962, Trial Examiner Eugene K. Kennedy issued his Intermediate Report in the above-entitled proceeding, and on September 5, 1962, an Erratum, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. The Trial Examiner also found that the Respondent had not engaged in certain other unfair labor practices alleged in the complaint, and recommended that these allegations be dismissed. Thereafter, the General Counsel, the Charging Party, and the Respondent filed exceptions to the Intermediate Report and supporting briefs.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in this case,[1] and hereby adopts the findings, conclusions and recommendations of the Trial Examiner to the extent that they are consistent with this Decision.

1. The Trial Examiner found that the Respondent, without a Board certification, threatened to and did picket Buckeye and Whiteside for recognition at the Elkhorn Ranch, and that such picketing continued for a period in excess of 30 days without the filing of a representation petition. We agree with this finding.

However, the Trial Examiner concluded that the Respondent did not thereby violate Section 8(b)(7)(C), on the ground that the individuals for whom the Respondent sought recognition were employed to construct and equip new poultry raising buildings, and thus were not employees because they were employed as "agricultural laborers," excluded from the definition of the term "employee" in Section 2(3) of the Act.

The Board disagrees with this conclusion of the Trial Examiner. In determining whether particular individuals are employed as "agricultural laborers,"

[1] Respondent's request for oral argument is denied, as in our opinion the record, exceptions, and briefs adequately present the issues and the position of the parties.

we believe it to be our duty to follow, whenever possible, the interpretation of Section 3(f) of the Fair Labor Standards Act adopted by the Department of Labor and its Wage and Hour Division, as that agency, and not this Board, has the responsibility and the experience of administering that Act.[2] The pertinent interpretation, set forth in Appendix B of the Intermediate Report, limits the agricultural-labor exemption to persons performing work on a farm as an incident to or in conjunction with farming operations; and the term "farm" is defined as a tract of land devoted to actual farming activities.

The evidence does not show that the Elkhorn Ranch was devoted to actual farming activities during the period pertinent to this proceeding. On the contrary, the evidence shows that at the commencement of the picketing, the Elkhorn Ranch was still a tract of land not yet developed into a farm, and that the installation of utilities was not completed until more than 3 months later. Moreover, the construction here appears to be a major independent construction activity in itself, and not part of an agricultural function.[3]

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[2] *Imperial Garden Growers*, 91 NLRB 1034, 1037. See also *Olaa Sugar Company*, 118 NLRB 1442.

[3] As the Supreme Court stated in *Farmers Reservoir Co. v. McComb*, 337 U.S. 755:

> "... the question as to whether a particular type of activity is agricultural is not determined by the necessity of the activity to agriculture nor by the physical similarity of the activity to that done by farmers in other situations. The question is whether the activity in the particular case is carried on as a part of the agricultural function or is separately organized as an independent productive activity."

In these circumstances, we cannot find that the Elkhorn Ranch was devoted to actual farming activities when the Respondent threatened to and started picketing Buckeye and Whiteside for recognition, or for several months thereafter. Since the individuals then employed by Buckeye and Whiteside were not shown to be performing work which was an incident to or in conjunction with actual farming operations, we find that they were "employees" within the meaning of Section 2(3) of the National Labor Relations Act. We further find that the Respondent violated Section 8(b)(7)(C) by the foregoing threats and picketing at the Elkhorn Ranch.

2. We agree with the Trial Examiner that the Respondent violated Section 8(b)(4)(i) and (ii)(B) of the Act for the reasons set forth in the Intermediate Report.[4]

ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Monterey County Building and Construction Trades Council, its officers, agents, representatives, successors, and assigns, shall:

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[4]The Trial Examiner declined to find certain additional violations of Section 8(b)(4)(i) and (ii)(B), based upon the conduct of Hansen, Shaw, and the Respondent in connection with the Granite and La Torre contract incidents, described on pages 10 through 13 inclusive of the Intermediate Report. We find it unnecessary to consider these incidents, since they are merely cumulative and would not alter the Order.

1. Cease and desist from:

(a) Engaging in, or inducing or encouraging any individual employed by Granite Construction Company, Sanders Electric Company, Inc., California Motor Express, or any other person, to engage in a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services; or threatening, restraining, or coercing Granite, Sanders, California Motor Express, or any other person, where, in either case, an object thereof is to force or require the above-named, or any other person, to cease doing business with Vito J. LaTorre, Buckeye Incubator Company (also d/b/a Buckeye Builders), or Jack L. Whiteside d/b/a Jack L. Whiteside Construction Co.

(b) Picketing or causing to be picketed, or threatening to picket or causing to be picketed, Buckeye or Whiteside under conditions prohibited by Section 8 (b)(7) of the Act, where an object thereof is forcing or requiring Buckeye or Whiteside to recognize or bargain with the Respondent, or any of its member unions, as the collective-bargaining representative of their employees, or forcing or requiring the employees of Buckeye or Whiteside to accept or select the Respondent or any of its member unions as their representative.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its business offices and meeting halls, copies of the notice attached hereto marked "Appen-

dix."[5] Copies of said notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by an authorized representative of the Respondent, be posted by said Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and mail to the Regional Director for the Twentieth Region sufficient copies of said notice, to be furnished by him, for posting by Buckeye and Whiteside, if willing.

(c) Notify the said Regional Director, in writing, within 10 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., April 22, 1963

Frank W. McCulloch, Chairman
Philip Ray Rodgers, Member
Boyd L. edom, Member
National Labor Relations Board

(SEAL)

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[5]In the event that this Order is enforced by a decree of a United States Court of Appeals, the notice shall be amended by substituting for the words "Pursuant to a Decision and Order," the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

APPENDIX
NOTICE TO ALL EMPLOYEES
PURSUANT TO
A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT engage in or induce or encourage any individual employed by GRANITE CONSTRUCTION COMPANY, SANDERS ELECTRIC COMPANY, INC., CALIFORNIA MOTOR EXPRESS, or any other person, to engage in a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services; nor will we threaten, restrain, or coerce GRANITE, SANDERS, CALIFORNIA MOTOR EXPRESS, or any other person, where, in either case, an object thereof is to force or require the above-named, or any other person, to cease doing business with VITO J. LA TORRE, BUCKEYE INCUBATOR COMPANY (also d/b/a BUCKEYE BUILDERS), or JACK L. WHITESIDE d/b/a JACK L. WHITESIDE CONSTRUCTION CO.

WE WILL NOT picket or cause to be picketed, or threaten to picket or cause to be picketed, BUCKEYE or WHITESIDE under conditions prohibited by Section 8(b)(7) of the Act, with an object of forcing or requiring BUCKEYE or WHITESIDE to recognize or bargain with us or any of our member unions as the representative of their employees, or forcing or requiring the

employees of BUCKEYE or WHITESIDE to accept or select us or any of our member unions as their collective-bargaining representative.

MONTEREY COUNTY BUILDING AND CONSTRUCTION TRADES COUNCIL
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate with the Board's Regional Office, 830 Market Street, San Francisco, California (Telephone YUkon 6-3500) if they have any question concerning this notice or compliance with its provisions.

Appendix B1

IR-(SF)-931

Watsonville, Calif.

United States of America

Before the National Labor Relations Board
Division of Trial Examiners

Branch Office
San Francisco, California

Monterey County Building
& Construction Trades Council

and

Case No. 20-CC-285

Vito J. La Torre, an Individual
Monterey County Building
& Construction Trades Council

and

Case No. 20-CP-66-1

Vito J. La Torre, an Individual
Monterey County Building
& Construction Trades Council

and

Case No. 20-CP-66-2

Vito J. La Torre, an Individual

E. Terry Durant and *Robert M. Yeates*,
for the General Counsel.

McCarthy, O'Hara & Johnson, by
P. H. McCarthy, Jr., Esq., for Respondent.

Angell, Adams, Gochnauer, Elder & Holmes,
by *Samuel L. Holmes, Esq.*, for the
Charging Party.

Before: *Eugene K. Kennedy*, Trial Examiner.

INTERMEDIATE REPORT AND RECOMMENDED ORDER

The hearing in these consolidated proceedings was held on various dates between May 31, 1962 and June 15, 1962, in Watsonville and San Francisco, California, before Eugene K. Kennedy, the undersigned Trial Examiner.

Issues litigated were whether Respondent Monterey County Building & Construction Trades Council violated Sections 8(b)(4)(i) and (ii)(B) and 8(b)(7)(C) of the National Labor Relations Act, as amended (herein the Act).[1]

Respondent denies the alleged violations and further contends that the employees involved are agri-

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[1] 8(b)(4) It shall be an unfair labor practice for a labor organization or its agents—(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or an industry affecting commerce, where in either case an object thereof is:

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9.

8(b)(7)(C) It shall be an unfair labor practice for a labor organization or its agents— to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective

cultural laborers and hence excluded from the term "employee" in Section 2(3) of the Act and that the 1962 Appropriation Act precludes the National Labor Relations Board (herein the Board) from asserting jurisdiction in these circumstances. The question of whether the 1962 Appropriation Act has the effect which Respondent asserts will be considered below.

Upon the entire record, my observation of the witnesses, and consideration of briefs filed by all parties, I make the following:

Findings of Fact

I. Jurisdiction of the Board and the business of the companies involved

La Torre, the charging party, along with his wife, is the owner of all the stock of three corporations operating poultry ranches in the Watsonville, Cali-

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bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(C) where such picketing has been conducted without a petition under Section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

fornia, area. The Elkhorn Ranch, also in the Watsonville area, the site of the dispute, was not incorporated but owned equally by La Torre and his wife. This ranch did not begin operating until early in the year 1962. The cost of the buildings and equipment exceeded one million dollars. The cost of feed originating out of State for use at the Elkhorn Ranch will approximate $500,000 a year annual rate. La Torre manages all four farms and when necessary will transfer poultry from one to another. In 1961, from Watsonville Farms, a La Torre corporation, there was sold in excess of $100,000 worth of eggs to Fort Ord, a military establishment.

Buckeye Incubator Company, also doing business under the name of Buckeye Builders, is a Delaware corporation doing business in all States of the Union. It is primarily a manufacturer of poultry equipment and it also acts as a financing agent in connection with the construction and installation of large scale poultry raising and feeding operations such as the La Torre Elkhorn Ranch operation. Its gross annual business exceeds $4,000,000, and in 1961 and 1962, it shipped products valued in excess of $250,000 direct to the Elkhorn Ranch.

Granite Construction Company, a California corporation, is engaged in general engineering work. Its function at the Elkhorn Ranch was primarily to prepare building sites and to construct roads. During 1961, it performed construction work for the United States Government at Fort Ord, Army installation, in an amount approximating $1,000,000, as well as

carrying out other substantial contracts for construction work with the United States Government. It is a member of the Northern Chapter of the Associated General Contractors, and in 1961, its gross volume of business exceeded $20,000,000.

Jack L. Whiteside, doing business as Jack L. Whiteside Construction Co., is a labor contractor. Under a contract with Buckeye, he performed construction work in the fall of 1961 and the spring of 1962 on the Elkhorn Ranch valued at about $175,000.

Sanders Electric Company, Inc. had an electrical contract with Buckeye to perform outside wiring on La Torre's Elkhorn Ranch. The contract price was $39,500. It also subsequently performed inside electrical work that Whiteside had originally agreed to perform on the Elkhorn project.

In summary, Buckeye was under contract to perform for La Torre the construction of buildings and installation of equipment. It had Whiteside and Sanders as subcontractors. Granite was under contract with La Torre to perform the site preparation, grading and road work. It is found that La Torre, Granite, Buckeye, Whiteside and Sanders are employers engaged in commerce or in a business affecting commerce within the meaning of the Act.[2]

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[2]It is clear that La Torre's, Granite's and Buckeye's volume of interstate business brings their operations within the Board's jurisdiction. Sanders and Whiteside, subcontractors to Buckeye, are by that fact alone engaged in a business affecting commerce to bring them within the ambit of the Board's jurisdiction. See *Madison Building & Construction Trades (Hildebrandt)*, 134 NLRB No. 43.

II. The labor organization involved

Monterey County Building & Construction Trades Council is an organization with delegates from various building trades unions, representing the constituent members of the Council. Its officers include Secretary Harry Foster and Secretary-Treasurer John Mattos, both of whom had prominent roles in the dispute here involved. The Council's printed form labor agreement, which also bears the names of two other Building Trades Councils, reflects that Respondent enters into collective bargaining agreements with employers in the construction industry. As conceded by the pleadings, it is found that Respondent Council is a labor organization within the meaning of the Act.

III. The unfair labor practices

A. *The events*

Vito La Torre, the charging party, in July 1961 entered into a contract with Buckeye for the construction and installation of poultry raising buildings and equipment. In the same month he entered into a contract with Granite for grading, road construction and for construction of drainage ditches. Buckeye subcontracted the construction work of the buildings to Whiteside. Whiteside employed carpenters, plumbers, laborers and electricians, none of whom were represented by a labor organization in connection with their employment with Whiteside. Buckeye's own employees installed the poultry raising equipment. Buckeye also subcontracted the outside electrical work to Sanders. The employees of

Granite and Sanders were represented by labor organizations in the course of their employment with the respective companies. Employees of Granite were represented by teamsters and operating engineers locals, and employees of Sanders were represented by an electrical union local. The operating engineers and electricians were members of locals that were constituent members of Respondent Council. The teamsters were not members of a constituent local but of another teamsters local union.

The circumstances preceding the picketing which commenced at the Elkhorn Ranch on September 20, 1961 were as follows. On September 1, 1961, Foster, secretary of Respondent Council, telephoned to Stevens, Vice President of Buckeye, and requested Stevens to execute Respondent's standard labor agreement. Stevens refused on the basis that Whiteside employed all the personnel within the jurisdiction of Respondent and suggested that Foster get in touch with Whiteside.

On September 8, 1961, Respondent by letter requested Buckeye to execute Respondent's standard labor agreement. In this connection, it is noted that although Buckeye apparently had no employees working within the jurisdiction of Respondent, under the terms of the standard labor agreement, the general contractor, Buckeye in this instance, would be obligated to engage only subcontractors who employed members of Respondent's constituent locals and also to make good the failure of any subcontractor to pay wages or fringe benefits provided by existing labor

agreements. The standard labor agreement also provided that any subcontractor must have its employees become union members of constituent locals after seven working days.

On September 8, 1961, Mattos and Foster, officers of Respondent Council, together with Miller, plumbers local delegate to Respondent Council, and Cornell carpenters delegate to Respondent Council, approached Whiteside at the Elkhorn Ranch. Foster at this time asked Whiteside to sign the standard labor agreement. Whiteside replied that if he could get more money from Buckeye he would be glad to sign the proposed agreement.

On September 15, 1961, Mattos again asked Whiteside whether he was going to sign the agreement and Whiteside replied in the negative. Mattos then said "Well, if you aren't, we have no alternative then to put a picket at the ranch." The picketing commenced on September 20 at the then only entrance to the Elkhorn Ranch which will be characterized herein as the main gate. The picket sign was as follows:

THE MONTEREY COUNTY BUILDING &
CONSTRUCTION TRADES COUNCIL
OR ITS AFFILIATED UNIONS DO NOT HAVE
A UNION CONTRACT
WITH BUCKEYE BUILDERS, INC.,
JACK L. WHITESIDE CONSTRUCTION CO.

As a result of this picketing, Granite employees (teamsters and operating engineers) ceased working on the Elkhorn Ranch project as of September 20,

1961. As a result of an arrangement between Granite and Respondent, a separate entrance at the Elkhorn Ranch was established for Granite employees and as a result of this, on September 25, 1961, Granite employees for the time being resumed work on the Elkhorn Ranch. A separate entrance also was established for Sanders employees on November 8, 1961. The main gate was at the end of a dead-end road and the special entrances permitted access to the Elkhorn Ranch without passing the picket as long as the picket was at the main gate. Special precautions were taken to insure that only the employees of Granite or Sanders used the gates designated for them.

On November 10, 1961, Foster and Mattos, officers of Respondent, spoke with Whiteside at the picketing site and asked him what he proposed in connection with having the picket removed from his project. Whiteside said he would be willing to sign an agreement that would put his employees "in the union" on May 1, 1963.[3]

On the following day, November 11, 1961, Foster and Mattos presented Whiteside with a proposed written agreement as follows:

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[3]It is apparent from the record that Whiteside and La Torre in using the term "Union" do not always distinguish between Respondent and its constituent locals. This is perhaps due to the fact that Respondent was a prospective party to the proposed Standard Labor Agreement, which, however, would have the effect of requiring employees to join various unions depending on the type of work they performed.

BUILDING AND CONSTRUCTION TRADES
COUNCIL OF MONTEREY COUNTY
117 Pajaro Street
SALINAS, CALIFORNIA

Jack L. Whiteside agrees to sign the standard Building Trades Agreement and the Building Trades agrees to give Mr. Whiteside a concession on this job (Maher Canyon Road) only as follows: Mr. Whiteside to list his present employees by name, approximately thirty in number, of the thirty, ten will be laborers, ten will be carpenters, two cement finishers, one plumber and the remainder to be apprentices. These men will join the respective unions having jurisdiction over the classifications they are listed under. The present employees will do any of the work on the abovementioned job which includes the foundations and building erection. Any new or additional employees will be hired under the hiring hall procedures of the various Locals and be paid the wage scale and other benefits covered under the agreement in effect in the area. It is understood the paving, electrical work, pipe-fitting, and other specialty work will be sub-contracted by other contractors at the prevailing wage rates and conditions in effect in this area. Five (5) consecutive days, Monday through Friday, shall constitute a week's work. No work shall be let by piece work, contract, or lump sum, direct with employees for labor services.

Whiteside found some of the terms unacceptable, and Foster stated he would "rearrange" it and return the next day to have it signed by Whiteside. However, on the next day, November 12, 1961, Foster did not

appear but Mattos and Cornell met with Whiteside. Cornell was the business representative of the carpenters local union and the delegate to Respondent Council. Whiteside was told the tentative agreement reached by Foster and himself was unacceptable to Respondent. Mattos suggested a post-dated agreement with Respondent. Whiteside advised Mattos he would discuss the matter with Buckeye to the end of having the payments to him from Buckeye increased "so I could support the labor of the union." Mattos at this time gave Whiteside the printed labor agreement used by Respondent Council which had been signed by Mattos and Cornell and was to be effective April 31, 1962.

On November 20, 1961, Respondent moved the picket from the main gate to the area where the special gates had been constructed for Sanders' and Granite's employees. This had the effect of requiring anyone, including Granite's and Sanders' employees, entering the Elkhorn Ranch to cross Respondent's picket line. On this same day Harley Davidson, a business representative of the operating engineers union, a delegate to Respondent Council and a signatory on behalf of Respondent Council, to an agreement executed with La Torre on January 4, 1962, and a participant in several meetings involving Respondent, told Westwater, a Buckeye official, that the picket had been moved because Respondent had decided "to stop the work on the job." On this record it is found that this statement of Davidson to Westwater is chargeable to Respondent.

The employees of Granite and Sanders did not go to work at times when Respondent had a picket at the entrances reserved for them which included the periods from November 20, 1961 until December 1, 1961; from about December 5, 1961 until January 4, 1962; and from January 24, 1962 until about February 9, 1962. The interruptions in the picketing flowed from efforts by Whiteside and La Torre to make arrangements to have the picket removed which Respondent did temporarily, but replaced the picket when the Respondent was not satisfied with interim developments during the cessation of the picketing.

La Torre had contracted for a large number of breeder stock chickens which were to be delivered in December 1961. He and Whiteside were particularly anxious to have the picketing removed from the Sanders and Granite entrance so that the construction could proceed on schedule.

On November 30, 1961, Whiteside arranged a meeting at the Elkhorn Ranch with Respondent's officers and delegates. Also present were La Torre and officials of Buckeye. An oral agreement was reached between Whiteside and Respondent providing that the picket would be removed, and that on May 1, 1962, Whiteside employees would go into the union. Since Whiteside employed carpenters, laborers, plumbers and electricians, undoubtedly the agreement contemplated that the employees would join the craft unions having jurisdiction over their work. Mattos, at the end of the November 30 meeting, called Granite's superintendent and informed him the picket line

would be removed and its employees could return to work the next day. Foster asked Whiteside to meet him at an attorney's office the next day where Whiteside was presented with a proposed written agreement. Whiteside refused to sign it because he believed its terms varied from the oral understanding of the previous day.

There was another meeting at the Elkhorn Ranch on December 2, 1961. Present were La Torre, Whiteside, officials of Buckeye, and Foster and Mattos. At this meeting, Foster insisted that Whiteside employees go into the union immediately. Whiteside insisted this was contrary to the agreement made on November 30, and the picketing was resumed at the Sanders and Granite gate on December 5, 1961.

La Torre, motivated by the increasing economic problems caused by the delay in the construction of his poultry raising facilities, initiated another meeting at the Elkhorn Ranch on January 3, 1962, at which Respondent's officers and other union officers were present. As a result of this meeting, La Torre executed the following agreement with Respondent:

1—777 Maher Road, Watsonville, California, known as Elkhorn Ranch—59 buildings (poultry houses) and one repair shop building to be completed under present contracts.

2—Poultry Processing Plant to be built in Gilroy by Nu-Laid to be built AFL-CIO.

3—Hatchery building on Elkhorn Ranch to be built AFL-CIO and all equipment in the building to be set by AFL-CIO.

4—Mr. La Torre and his associates will meet in San Francisco at 474 Valencia Street within ten (10) days with representatives of the respective crafts. This will include ten (10) of the largest poultry ranchers and Nu-Laid Egg Company.

5—No electrical work will be performed for the next ten (10) days.

6—In consideration of the foregoing, the picket will be removed from the Elkhorn Ranch during this period.

Signed this *4th* day of January, 1962.

/s/ Harry Foster
Building & Construction
Trades Council
/s/ John F. Mattos
/s/ Wm. Harley Davidson

/s/ V. J. La Torre

On January 23, 1962, La Torre and other ranchers with large poultry operations met with officers of Respondent and other union officials in the San Francisco Labor Temple. The union officials proposed that the poultry ranchers form an association to deal with the union on behalf of their employees. The representative of the ranchers replied they would have to consider the proposal. On January 24, the picket was again at a position in front of the adjoining Granite and Sanders entrances of the La Torre Elkhorn Ranch.

On February 1, 1962, the picket sign was changed to read:

JACK L. WHITESIDE CONST. CO.
&
BUCKEYE BUILDERS
U N F A I R
The employees work under less
favorable conditions than the AFL-CIO
Building Trades Craftsmen
U N F A I R
Monterey County Building and Const. Trades Council

On February 9, 1962, the picket was removed from the Granite and Sanders entrances to the original site of the picketing which is the main entrance to the Elkhorn Ranch.

B. *The Question of the Agricultural Exemption*

Respondent contends that the Board is without jurisdiction in this matter because the individuals involved who were working in connection with the construction of the poultry raising buildings are not employees covered by the Act. The argument rests on the following authorities.

Section 2(3) of the Act provides:

> The term "employee" shall include any employee . . . but shall not include any individual employed as an agricultural laborer. . . .

The 1962 Appropriation Act for the National Labor Relations Board provides:

> . . . Provided, That no part of this appropriation shall be available to organize or assist in organizing agricultural laborers or used in connection with investigations, hearings, directives, or orders

> concerning bargaining units composed of agricultural laborers as referred to in section 2(3) of the Act of July 5, 1935 (29 U.S.C. 152), and as amended by the Labor-Management Relations Act, 1947, as amended, and as defined in section 3(f) of the Act of June 25, 1938 (29 U.S.C. 203), and including in said definition employees engaged in the maintenance and operation of ditches, canals, reservoirs, and waterways when maintained or operated on a mutual, nonprofit basis and at least 95 percentum of the water stored or supplied thereby is used for farming purposes.
>
> (Title III, Act of Aug. 2, 1961, Public Law 86-290, 87th Congress, 1st Sess.)

The Board as a matter of policy will follow the interpretation of the Department of Labor as to what individuals are agricultural laborers.[4]

In general, work performed on a farm incident to the operation of a farm is within the agricultural exemption. It is immaterial whether the work is done directly for the farmer or an independent contractor. Employees engaged in building terraces, construction of granaries, or silos are agricultural laborers within the statutory definition of being engaged in employment in practices on a farm. Poultry raising is within the statutory ambit of the agricultural exemption. Hence anomalous as it may seem, I find that under existing decisional precedent the carpenters, electricians, plumbers, and laborers employed by White-

[4] *Olaa Sugar Company, Ltd.*, 118 NLRB 1442.

side, a labor contractor, were agricultural laborers while they were engaged in constructing buildings to be used by La Torre in raising his own poultry. It is also found that the individuals employed by Buckeye to install the poultry feeding and raising equipment were agricultural laborers for the purpose of this proceeding. Appendix B attached hereto contains quotations from authorities which support the finding that individuals employed by Whiteside and Buckeye were "agricultural laborers."

It is abundantly clear that a purpose of Respondent's picketing was to have Whiteside and Buckeye recognize Respondent as the representative of the individuals employed by Whiteside and Buckeye. Whiteside employed carpenters, electricians, laborers and plumbers in connection with the construction of buildings to house La Torre's poultry. Buckeye employed individuals who installed poultry equipment in these buildings. Although not conclusively developed, Buckeye appeared to be the object of Respondent's picketing because his subcontractor Whiteside employed workers within Respondent's jurisdiction. Respondent's standard labor agreement, if executed by Buckeye, would have obligated Buckeye to have Whiteside conform to Respondent's standard labor agreement, or to engage another subcontractor who would.

C. *Effect of the Agricultural Exemption*

The effect of the exemption will first be considered in connection with Section 8(b)(7)(C) of the Act.

(See footnote 1 for text of section.) This section proscribes picketing by unions to obtain recognition by an employer of the picketing union as the representative of his *employees*. (Emphasis supplied.) It also by its terms eliminates its proscription when the union has filed a timely petition under Section 9(c) for an election.

Although the record facts here make it clear that the Respondent without a Board certification was picketing for recognition by Whiteside and Buckeye in excess of thirty days without filing a timely petition, it also is true that if their "employees" for the purpose of this proceeding are agricultural laborers, the Board would not entertain a representation petition filed by Respondent with respect to the workers employed by Buckeye and Whiteside. Since for the purposes of this proceeding, Whiteside and Buckeye do not have "employees," it follows that a primary element of Section 8(b)(7)(C) is missing that is necessary to establish a violation.

Section 8(b)(7)(C) contemplates a representation proceeding and an election and, therefore, accepting the premise that Respondent could not file a representation petition with respect to the "employees" of Whiteside and Buckeye, the clear implication follows that the action of picketing to obtain recognition as representative of "agricultural laborers" is not covered by Section 8(b)(7)(C) of the Act. In factual situations such as the case at hand, innocent parties to the dispute have recourse under other sections of the Act.

A different situation prevails with respect to the effect of the agricultural exemption as applied to 8(b)(4)(i)(ii)(B). (See Footnote 1 for text of section). This section proscribes picketing for stated objects aimed at inducing or encouraging *individuals* employed by a person engaged in commerce or the threatening or restraining of any *persons* engaged in commerce or an industry affecting commerce. (Emphasis supplied.) The legislative history of the 1959 amendments to the Act makes it clear that Congress substituted "individual" and "person" for "employees" because it wished to prohibit secondary picketing even where agricultural laborers or other exempt "employees" were involved as well as to prohibit coercion directed at a secondary employer where the union bypassed employees, and aimed its coercion at the secondary employer.[5]

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[5]Illustrative of the considerations leading to the 1959 amendments are the following comments:

Senator Curtiss:

> Sophisticated unions avoid the proscriptions of the act by directly threatening or coercing the secondary employer or his supervisory personnel. They also avoid these proscriptions by inducing individual employees, or workers not defined as employees by the act—railroad and agricultural workers— to refuse to handle the products of the primary employer or by preemployment inducement of workers not to handle certain products. None of these activities is prohibited, because the means used are not those prohibited by the act.

105 Daily Congressional Record, 1176, January 28, 1959, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, U.S. Govt. Printing Office, 1959, Vol. II, p. 989.

Senator Goldwater:

> The word "person" is used in the proposed amendment to the secondary boycott provision rather than "employer," in order to extend the protection of the secondary boycott

D. *Violations of Section 8(b)(4)(i)(ii)(B)*

1. Work stoppage of Granite's employees on September 22, 1961

Granite's employees refused to cross the picket line established at the Elkhorn Ranch on September 20, 1961. On September 21, 1961, Granite rented to Buckeye a ready-mix concrete truck with the Granite sign painted out. This truck crossed the picket line and made deliveries on the Elkhorn project. On the morning of September 22, 1961, Con Hansen, a busi-

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provisions of the act to public employers, railroads, or agricultural enterprises without subjecting them to other provisions of the act.

105 Daily Congressional Record, 5764, April 21, 1959, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, U.S. Govt. Printing Office, 1959, Vol. II, p. 1079.

Senator Morse:

Similarly, a secondary boycott carried out by inducing railroad employees should not be permitted, merely because the employees' employer is not covered by the Act.

105 Daily Congressional Record, 16397, September 3, 1959, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, U.S. Govt. Printing Office, 1959, Vol. II, p. 1426.

Congressman Rhodes:

As the statute is now worded it is unlawful for a union to induce or encourage "employees of employer" to engage in a strike or "concerted refusal" to do their work for one of the forbidden objects listed in section 8(b)(4), such as to force their employer to cease doing business with a "primary" employer. Since farm laborers, railway labor, and supervisors are not "employees" within the meaning of the act, unions may now without penalty induce them to engage in secondary boycotts. The Landrum-Griffin bill corrects this by changing the word "employees" in the phrase quoted above to "any individual employed by any person." This change appears in clause 4(i).

105 Daily Congressional Record, 4208, August 11, 1959, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, U.S. Govt. Printing Office, 1959, Vol. II, p. 1581.

ness representative of a Teamsters local not a member of Respondent Council, appeared at Granite's premises and as a result of his appearance and instructions, all of Granite's some 20 or 25 operating engineers and teamsters stopped working. On this occasion, Hansen also told Westwater, an official of Buckeye, that before Granite's employees could resume work, the truck, rented to Buckeye, had to be "pulled off the job." According to Westwater, this work stoppage was caused "as a consequence of the action taken by the Teamsters Union." Shortly thereafter, Hansen arranged facilities at a restaurant for a meeting attended by Buckeye representatives and other union representatives. At this meeting an arrangement was worked out whereby it was agreed that a separate gate would be established for use by Granite employees which would be free from picketing.

Hansen's action at Granite's premises on the morning of September 22 was a violation of Section 8(b)(4)(i)(ii)(B) attributable to Hansen's local union. This local union, however, is not a named respondent, not a member of Respondent Council, and consequently not a party to this proceeding.

However, the General Counsel contends that on the basis of the above recited record facts, Hansen was acting as an agent of Respondent. A determination of this question must be made in accordance with common law rules of agency.[6] The mere fact that

[6] *House Conference Rep. 510, 80th Cong.*, 1st Session, 93 Congressional Record 37.

Hansen was taking action consistent with an aim of Respondent, I believe, is insufficient to establish that Hansen was acting as agent for Respondent. In addition, there is the plausible hypothesis that Hansen was acting in the interest of his own drivers who were deprived of work by the rental of the truck to Buckeye by Granite which occasioned it being operated by some one other than a member of Hansen's local. Although his members refused to cross the picket line of Respondent, the action of Hansen in compelling Granite not to rent a truck to Buckeye and his arrangement of a meeting whereby a separate, non-picketing entrance was provided for Granite employees at the Elkhorn Ranch eventuated in restoring the members of Hansen's local to the operation of the trucks sent by Granite to the Elkhorn Ranch. Accordingly, the contention that Hansen's actions on September 27, 1961, are binding on Respondent is rejected, since the General Counsel has not established an agency relationship by an adequate measure of proof.

2. Picketing at the Granite and Sanders entrances

On November 20, 1961, Respondent moved its picket to a location where anyone entering either the main gate or the gates established for Sanders' and Granite's employees would have to pass such picket. On this same day Harley Davidson told Westwater, a Buckeye official, that Respondent Council had decided to "stop the work on the job," referring to the construction at La Torre's Elkhorn Ranch. As found

above, Davidson was a responsible agent of Respondent. His union was a member of Respondent Council and he was a delegate to the Council. He participated in several meetings with officers of Respondent and with Whiteside, Buckeye, and La Torre, where the subject was recognition of Respondent by Whiteside. Moreover, he was a signatory to an agreement, along with Foster and Mattos, entered into on January 4, 1962, with La Torre, which agreement was made on behalf of Respondent.

It is apparent that the special gate picketing in the context of the facts here related was action engaged in by Respondent to induce and encourage individuals employed by a person engaged in commerce or in an industry affecting commerce to refuse to transport goods or perform work with an object of forcing persons, including Granite and Sanders, to cease doing business with La Torre, Buckeye, and Whiteside. Considering that Granite's employees had previously refused to cross the picket line, and they and the employees of Sanders had been using non-picketed, separate entrances until November 20, there can be no reasonable doubt that this picketing violated 8(b)(4)(i)(B). See *Highway Truck Drivers and Helpers (Riss and Co.)*, 130 NLRB 943.

The question remains as to whether the picketing for this proscribed object also comes within the interdiction of 8(b)(4)(ii)(B) where it is made unlawful for a labor organization to "threaten, coerce, or restrain any person . . . ." An examination of decisional precedents appears to bear out the conclusion that

picketing unlawful under 8(b)(4)(i) is also unlawful under 8(ii).[7]

The picketing from January 4 to January 24, and from January 24 to February 9, 1962, conducted at the Sanders and Granite entrances when the negotiations between Whiteside and Respondent proved fruitless also constituted violations of 8(b)(4)(i)(ii)(B) inasmuch as the identical factors were present in the two latter episodes of picketing, as were present in connection with the picketing commencing on November 20, 1961 at the special entrances.

3. Claimed additional violations

Although not alleged as violations in the complaint, the General Counsel urges three episodes as establishing separate violations.

(a) *The Granite incident*

It is argued that during a time when Respondent was picketing at Granite's separate entrance, the re-

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[7]For example, *Construction, Production & Maintenance Laborers*, 137 NLRB No. 149; *Photostat & Photo Employees Union*, 135 NLRB 106; *Upholsterers Union*, 132 NLRB No. 2; however, in *Fruit Packers Local 760 v. N. L. R. B. (Tree Fruits Labor Relations Committee, Inc.)* C.C.A.D.C. 50 LRRM 392, the District of Columbia Circuit in a case involving handbilling at the site of the secondary employer held that a violation of (ii) was not established because "there was no work stoppage, no interruption of deliveries, no violence or threat of violence." It rejected, apparently, the *per se* rule that picketing inevitably threatens, coerces, or restrains the employer at whose site the picketing is conducted. Since in the case at hand there were work stoppages and interruption of deliveries, the distinction made in the *Tree Fruits* case need not be considered.

fusal by Respondent to agree that Granite could do some work to repair rain damage behind the picket line is a separate violation of 8(b)(4)(ii)(B). I find that this refusal was a refusal to stop existing unlawful conduct and not a separate violation. In other words, it seems illogical to find a separate violation by reason of Respondent's refusal to discontinue its illegal conduct. In any event, finding this conduct to be a separate violation would in no manner affect the remedy which will be recommended herein.

(b) *The La Torre Contract incident*

As an inducement for Respondent to remove its picket on January 4, 1962, La Torre executed a contract with Respondent in which, among other things, he agreed that no electrical work would be performed on the Elkhorn Ranch for a period of 10 days. The picketing that precipitated this agreement was unlawful. The contract, although perhaps voidable as being caused by illegal activity, does not warrant a separate finding of 8(b)(4)(ii)(B); and further, it appears questionable whether La Torre was agreeing to anything more than what the illegal picketing had already accomplished. Moreover, La Torre's control over the electrical work, if any, was indirect as both Sanders and Whiteside who employed electricians were subcontractors of Buckeye. The contract was executed at a meeting initiated by La Torre who was looking for a "deal" to get the picket removed. No extra threat or coercion actuated the agreement. It was the picketing that provided the coercing and I am unable to find the execution of this agreement by La

Torre and Respondent was a separate violation of 8(b)(4)(ii)(B) on the part of Respondent.

(c) *Alleged illegal conduct of Shaw, the Business Representative for the Electricians local*

The initial inquiry is directed to the question of whether Shaw was acting for Respondent. He was a delegate to the Respondent Council commencing on December 7, 1961, and a business representative for several years prior thereto.

He told Stevens, Buckeye's representative, that unless Buckeye executed Respondent's standard labor agreement, he [Shaw] would personally see there was no additional electrical work done on the Elkhorn facility. Shaw also participated in some meetings Respondent's officers had with Whiteside and La Torre. On January 15, 1962, he forced Whiteside to abandon part of his electrical contract with Buckeye and to assign it to Sanders as a condition for Shaw going back to work. Other employees joined Shaw when he threatened to walk off unless Whiteside's nonunion electricians were removed from the job so that Shaw and his fellow employees of Sanders would resume their work. Since Shaw was the business representative of the local, I find his announcing he would not work until Sanders obtained Whiteside's electrical work was a signal to his fellow electrical workers to also quit. This finding is also fortified by Shaw's statement at the time addressed to Sanders and Whiteside ". . . before *we* go back to work *I* want to see that contract," referring to the contract executed then by

Sanders and Whiteside in which Sanders was to perform the electrical work previously done by Whiteside.

All of Shaw's conduct is consistent with furthering the interest of his local union. Urging Buckeye to sign Respondent's standard labor agreement would result in having the electrical work placed within his union's jurisdiction. I do not find his position as delegate to Respondent Council, nor his participation in meetings with Respondent's officers, establishes that he was here acting on behalf of Respondent Council rather than his local union. My observation of Mr. Shaw as a witness, and a close examination of his testimony suggested he was probably more interested in his own union than the aims of Respondent. Consequently, I find the General Counsel has failed to sustain his burden of proof in establishing Shaw was acting for Respondent. Moreover, whether or not a separate violation is predicated on Shaw's action, the recommended remedy would be the same.

E. *Effect of picketing on employers other than Granite and Sanders*

The complaint alleges that the effect of the picketing was to stop deliveries to the Elkhorn project involving trucks driven by employees of California Motor Express and the Merchants Express.

These allegations will be discussed as they are related to the scope of a recommended order. In view of the fact no violation of 8(b)(7)(C) has been found, this stoppage of deliveries is not relevant under that section of the Act.

This picketing by Respondent at the special entrances clearly had an unlawful objective aimed at inducing and encouraging the employees of Sanders and Granite to cause their respective employers to cease doing business with La Torre, Buckeye and Whiteside. As far as this record reflects, this enmeshing of an employer other than Granite and Sanders was reasonably within the contemplation of Respondent. Respondent's avowed purpose in picketing at the special entrances was to shut the job down.

It is noted here that the picketing position at the special entrances as far as neutral employers were concerned was the same as if the pickets were at the main entrance. This is because the Granite and Sanders entrances were reserved for the exclusive use of their respective employees, and the main entrance was at the termination of a dead-end road. Thus, positioning the picket at the special entrances instead of at the main gate would only specifically affect Granite's and Sanders' employees and, any one else entering the project would have to pass the picket irrespective of whether the picket was located at the special entrances or the main gate.

Accepting the premise that the picket at the special entrances illegally stopped deliveries by California Motor Express on November 22 and December 11, 1961, the question is suggested as to the legality of picketing on February 20, 1962, when the driver of a Merchants Express vehicle refused to make a delivery when Respondent's picket was at the main gate. Inasmuch as the picketing at the main gate prior to

November 20, 1961, met the permissible standards of common situs picketing[8] and the moving of the picket on February 9, 1962, from the special entrances to the main gate is consistent with the abandonment of an unlawful purpose by Respondent, this record does not adequately spell out a violation of 8(b)(4)(i)(ii)(B) on February 20, 1962, because a driver of a neutral employer refused to make delivery because of the picket at the main gate. It is recognized that the driver was a member of a constituent member of Respondent Council, and his action in refusing to make the delivery because of the picket was reasonably foreseeable by Respondent. However, since Respondent was exercising its right to truthfully proclaim a situation at the only entrance permissible to do so, and since its picket sign made it clear that its dispute was with Whiteside and Buckeye, and since it was picketing the entrance used by their employees, the interested employers must accept the burden of having deliveries stopped as an incident to lawful concerted activity. If the picketing were at an entrance reserved for employees of neutral employers, then an object of unlawfully inducing and encouraging employees of neutral employers would be more recognizable and the balance of considerations in connection with the common situs picketing of February 20, 1962, would require further examination.

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[8]In the matter of *Sailors' Union of the Pacific, AFL and Moore Dry Dock Company*, 92 NLRB 547.

IV. The effect of the unfair labor practices upon commerce

The activities of Respondent, set forth in Section III, above, occurring in connection with the operation of the employers set forth in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

Upon the basis of the above findings of fact, and upon the entire record in the case, I make the following:

Conclusions of Law

1. La Torre, Buckeye, Granite, Whiteside, and Sanders are, each of them, engaged in commerce, or in a business affecting commerce, within the meaning of the Act.

2. Respondent Monterey County Building & Construction Trades Council is a labor organization within the meaning of the Act.

3. By inducing and encouraging employees of Granite and Sanders to strike, and by threatening and coercing Granite and Whiteside with an object of causing Granite and Sanders to cease doing business with La Torre, Buckeye, and Whiteside, Respondent Monterey County Building & Construction Trades Council has engaged in unfair labor practices within the meaning of Section 8(b)(4)(i)(ii)(B) of the Act.

4. By inducing and encouraging employees of California Motor Express to refuse to make deliveries,

and by threatening and coercing California Motor Express, with an object of forcing Granite and Sanders to cease doing business with La Torre, Buckeye, and Whiteside, Respondent Monterey County Building & Construction Trades Council has engaged in unfair labor practices within the meaning of Section 8(b)(4)(i)(ii)(B) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

6. Respondent Monterey County Building & Construction Trades Council did not violate Section 8(b)(7)(C) of the Act, by picketing Buckeye and Whiteside at La Torre's Elkhorn Ranch, nor did it violate Section 8(b)(4)(i)(ii)(B) of the Act except insofar as set forth above.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, it is recommended that Respondent Monterey County Building & Construction Trades Council, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Inducing or encouraging employees of Granite or Sanders, or any other employer, to strike where an object thereof is to cause Granite or Sanders or any other employer to cease doing business with La Torre, Buckeye, or Whiteside.

(b) Inducing or encouraging employees of the California Motor Express or any other employer to withhold deliveries where an object thereof is to cause Granite or Sanders to cease doing business with La Torre, Buckeye, or Whiteside.

(c) Threatening or coercing Granite, Sanders, California Motor Express or any other employer where an object is to cause such employers, or any other employer, to cease doing business with La Torre, Buckeye, or Whiteside.[9]

2. Take the following affirmative action:

(a) Post at its business offices in the affected area copies of the notice attached hereto as Appendix A.[10] Copies of said notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by an authorized representative of the Respondent, be posted by said Respondent immediately upon receipt thereof and maintained for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps

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[9]Because the California Motor Express became involved and the likelihood is that other carriers or employers of members of constitutent locals of Respondent will become involved, a broad cease and desist order is being recommended.

[10]In the event that these Recommendations be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDATIONS OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

shall be taken by said Respondent to insure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for the Twentieth Region in writing, within 20 days from the date of the receipt of this Intermediate Report and Recommend Order, what steps Respondent has taken to comply herewith.[11]

It is also recommended that unless the Respondent shall within 20 days from the date of the receipt of this Intermediate Report notify said Regional Director in writing that it will comply with the foregoing recommendations, the National Labor Relations Board shall issue an order requiring Respondent to take the aforesaid action.

Dated:

Eugene K. Kennedy,
Eugene K. Kennedy,
Trial Examiner.

[11]In the event that these Recommendations be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps Respondent has taken to comply herewith."

APPENDIX A

NOTICE
PURSUANT TO
THE RECOMMENDATIONS OF
A TRIAL EXAMINER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify members of the local unions which are members of the Monterey County Building & Construction Trades Council that:

WE WILL NOT induce or encourage individuals employed by GRANITE CONSTRUCTION COMPANY, SANDERS ELECTRIC COMPANY, INC., or any other employer, to strike, or induce or encourage individuals employed by CALIFORNIA MOTOR EXPRESS or any other employer, to refuse to make deliveries where an object thereof is to force or require GRANITE CONSTRUCTION COMPANY, SANDERS ELECTRIC COMPANY, INC., CALIFORNIA MOTOR EXPRESS, or any other employer, to cease doing business with VITO J. LA TORRE, BUCKEYE INCUBATOR COMPANY, or JACK. L. WHITESIDE CONSTRUCTION COMPANY.

WE WILL NOT threaten or coerce GRANITE CONSTRUCTION COMPANY, SANDERS ELECTRIC COMPANY, INC., CALIFORNIA MOTOR EXPRESS, or any other person engaged in commerce, where an object is to cause such person to cease doing business with VITO J. LA TORRE, BUCKEYE INCUBATOR

COMPANY, or JACK L. WHITESIDE CONSTRUCTION COMPANY.

MONTEREY COUNTY BUILDING & CONSTRUCTION TRADES COUNCIL
(Labor organization)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

APPENDIX B

U.S. DEPARTMENT OF LABOR
Wage and Hour and Public Contracts Divisions
Washington 25, D.C.

PART 780—EXEMPTIONS APPLICABLE TO AGRICULTURE, PROCESSING OF AGRICULTURAL COMMODITIES, AND RELATED SUBJECTS.

TITLE 29—LABOR

Chapter V—Wage and Hour Division, Department of Labor

SUBCHAPTER B—STATEMENTS OF GENERAL POLICY OR INTERPRETATION NOT DIRECTLY RELATED TO REGULATIONS

Federal Register November 3, 1961

STATUTORY PROVISIONS

§ 780.103 "Agriculture" as defined by the Act.

Section 3(f) of the Act defines "agriculture" as follows:

"Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and

any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

§ 780.134 Raising of poultry in general.

(a) The term "poultry" includes domesticated fowl and game birds. Ducks and pigeons are included. Canaries and parakeets are not included.

(b) The "raising" of poultry includes the breeding, hatching, propagating, feeding and general care of poultry. Slaughtering, which is the antithesis of "raising", is not included. To constitute "agriculture", slaughtering must come within the secondary meaning of the term "agriculture". The temporary feeding and care of chickens and other poultry for a few days pending sale, shipment or slaughter is not the "raising" of poultry. However, feeding, fattening and caring for poultry over a substantial period may constitute the "raising" of poultry.

§ 780.138 Required relationship of practices to farming operations.

To come within this secondary meaning, a practice must be performed either by a farmer or on a farm. It must also be performed either in connection with the farmer's own farming operations or in connection with farming operations conducted on the farm where the practice is performed. In addition, the practice must be performed "as an incident to or in conjunction

with" the farming operations. No matter how closely related it may be to farming operations, a practice performed neither by a farmer nor on a farm is not within the scope of the "secondary" meaning of "agriculture".

PRACTICES PERFORMED "ON A FARM"

§ 780.143 Performance "on a farm" generally.

If a practice is not performed by a farmer, it must, among other things, be performed "on a farm" to come within the secondary meaning of "agriculture" in section 3(f). Any practice which cannot be performed on a farm, such as "delivery to market", is necessarily excluded, therefore, when performed by someone other than farmer (see Farmers Reservoir Co. v. McComb, 337 U.S. 755; Chapman v. Durkin, 214 F. 2d 360, cert. denied 348 U.S. 897; Fort Mason Fruit Co. v. Durkin, 214 F. 2d 363, cert. denied 348 U.S. 897). Thus, employees of an alfalfa dehydrator engaged in hauling chopped or unchopped alfalfa away from the farms to the dehydrating plant are not employed in a practice performed "on a farm".

§ 780.144 Meaning of "farm".

A "farm" is a tract of land devoted to the actual farming activities included in the first part of section 3(f). Thus, the gathering of wild plants in the woods for transplantation in a nursery is not an operation performed "on a farm". (For a further discussion, see § 780.176.) The total area of a tract operated as a unit for farming purposes is included in the "farm", irrespective of the fact that some of this area may not be

utilized for actual farming operations (see NLRB v. Olaa Sugar Co., 242 F. 2d 714; In re Princeville Canning Co., 14 WH Cases 641 and 762). It is immaterial whether a farm is situated in the city or in the country. However, a place in a city where no primary farming operations are performed is not a farm even if operated by a farmer (Mitchell v. Huntsville Nurseries, 267 F. 2d 286).

§ 780.145 Employment in practices on a farm.

Employees engaged in building terraces or threshing wheat and other grain, employees engaged in the erection of silos and granaries, employees engaged in digging wells or building dams for farm ponds, employees engaged in inspecting and culling flocks of poultry, and pilots and flagmen engaged in the aerial dusting and spraying of crops are examples of the types of employees of independent contractors who may be considered employed in practices performed "on a farm".

Appendix C

Office of the Clerk
U. S. Court of Appeals
P. O. Box 547
San Francisco, Calif. 94101

Aug. 18, 1964

Messrs. McCarthy, O'Hara & Johnson
Attorneys at Law
593 Market St.
San Francisco, Calif.

Dear Sir:

In case No. 19053—N.L.R.B. vs. Monterey County Building & Const. Trades Council an opinion was this day filed, in accordance with which a Judgment was filed and entered granting the Board's petition for enforcement of its Order.

Pursuant to Rule 26, and unless the judgment is stayed by the order of the Court, or unless a petition for a rehearing of the cause be filed meantime, and as provided by Rule 23, a certified copy of the judgment of this Court will be due to issue on the expiration of 30 days from date hereof.

Time for certiorari petition: Civil cases, 90 days; Criminal cases, 30 days.

Sincerely,
Frank H. Schmid,
Clerk.

Office of the Clerk
U. S. Court of Appeals
P. O. Box 547
San Francisco 1, Calif.

Oct. 1, 1964

Messrs. McCarthy, O'Hara & Johnson
Attorneys at Law
593 Market St.
San Francisco, Calif.

Dear Sir:

The Petition for a Rehearing heretofore filed in case No. 19053—NLRB v. Monterey County Bld & Construction Trades Council was this day denied.

Pursuant to Rule 26, and unless stayed by the order of the Court, a certified copy of the judgment of this Court under said Rule will be due to issue on the expiration of five (5) days from the date hereof.

Time for certiorari petition: Civil cases, 90 days; Criminal cases, 30 days.

Sincerely,
Frank H. Schmid,
Clerk.

United States Court of Appeals
for the Ninth Circuit

National Labor Relations Board, Petitioner, vs. Monterey County Building and Construction Trades Council, Respondent.	No. 19,053

DECREE

Before: Jertberg and Duniway, Circuit Judges, and Jameson, District Judge.

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it on April 22, 1963, against the above-named Respondent. The Court heard argument of respective counsel on June 1, 1964, and has considered the briefs and transcript of record filed in this cause. On August 18, 1964, the Court, being fully advised in the premises, handed down its opinion granting enforcement of the Board's said order. In conformity therewith, it is hereby

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Ninth Circuit that Respondent, Monterey County Building and Construction Trades Council, its officers, agents, representatives, successors, and assigns, shall:

1. Cease and desist from:

(a) Engaging in, or inducing or encouraging any individual employed by Granite Construction Company, Sanders Electric Company, Inc., California Motor Express, or any other person, to engage in a strike or refusal in the course of his employment to use, manufacture, process, transport, or othewise handle or work on any goods, articles, materials, or commodities, or to perform any services; or threatening, restraining, or coercing Granite, Sanders, California Motor Express, or any other person, where, in either case, an object thereof is to force or require the abovenamed, or any other person, to cease doing business with Vito J. LaTorre, Buckeye Incubator Company (also d/b/a Buckeye Builders), or Jack L. Whiteside d/b/a Jack L. Whiteside Construction Co.

(b) Picketing or causing to be picketed, or threatening to picket or causing to be picketed, Buckeye or Whiteside under conditions prohibited by Section 8(b)(7) of the National Labor Relations Act, where an object thereof is forcing or requiring Buckeye or Whiteside to recognize or bargain with the Respondent, or any of its member unions, as the collective-bargaining representative of their employees, or forcing or requiring the employees of Buckeye or Whiteside to accept or select the Respondent or any of its member unions as their representative.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its business offices and meeting halls, copies of the notice attached hereto marked "Appendix." Copies of said notice to be furnished by the Regional Director for the Twentieth Region (San Francisco, California), shall, after being duly signed by an authorized representative of the Respondent, be posted by said Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to its members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Sign and mail to the aforesaid Regional Director sufficient copies of said notice, to be furnished by him, posting by Buckeye and Whiteside, if willing.

(c) Notify the said Regional Director, in writing, within 10 days from the date of this Decree, what steps the Respondent has taken to comply herewith. Endorsed, Decree Filed and Entered Aug. 18, 1964.

/s/ Frank H. Schmid
Frank H. Schmid
Clerk.

A TRUE COPY,
ATTEST: Oct. 13, 1964.

/s/ Frank H. Schmid
Frank H. Schmid
Clerk.

APPENDIX

NOTICE TO ALL EMPLOYEES
PURSUANT TO

A decree of the United States Court of Appeals enforcing an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

WE WILL NOT engage in or induce or encourage any individual employed by GRANITE CONSTRUCTION COMPANY, SANDERS ELECTRIC COMPANY, INC., CALIFORNIA MOTOR EXPRESS, or any other person, to engage in a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services; nor will we threaten, restrain, or coerce GRANITE, SANDERS, CALIFORNIA MOTOR EXPRESS, or any other person, where, in either case, an object thereof is to force or require the above-named, or any other person, to cease doing business with VITO J. LA TORRE, BUCKEYE INCUBATOR COMPANY (also d/b/a BUCKEYE BUILDERS), or JACK L. WHITESIDE d/b/a JACK L. WHITESIDE CONSTRUCTION CO.

WE WILL NOT picket or cause to be picketed, or threaten to picket or cause to be picketed, BUCKEYE or WHITESIDE under conditions prohibited by Section 8(b)(7) of the Act, with an object of forcing or requiring BUCKEYE or

WHITESIDE to recognize or bargain with us or any of our member unions as the representative of their employees, or forcing or requiring the employees of BUCKEYE or WHITESIDE to accept or select us or any of our member unions as their collective-bargaining representative.

MONTEREY COUNTY BUILDING AND CONSTRUCTION TRADES COUNCIL
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate with the Board's Regional Office, 830 Market Street, San Francisco, California (Telephone YUkon 6-3500) if they have any question concerning this notice or compliance with its provisions.

Appendix D

NATIONAL LABOR RELATIONS BOARD APPROPRIATION ACT

The 1962 National Labor Relations Board Appropriation Act provides:

> ". . . Provided, That no part of this appropriation shall be available to organize or assist in organizing agricultural laborers or used in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers as referred to in section 2(3) of the Act of July 5, 1935 (29 U.S.C. 152), and as amended by the Labor-Management Relations Act, 1947, as amended, and as defined in Section 3(f) of the Act of June 25, 1938 (29 U.S.C. 203), and including in said definition employees engaged in the maintenance and operation of ditches, canals, reservoirs, and waterways when maintained or operated on a mutual, non-profit basis and at least 95 per centum of the water stored or supplied thereby is used for farming purposes."
>
> (Title III, Act of Aug. 2, 1961, Public Law 86-290, 87th Congress, 1st Sess.)

FAIR LABOR STANDARDS ACT

Section 3(f) of the Fair Labor Standards Act as amended is as follows:

> "(f) 'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the

production, cultivation, growing and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in Section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, furbearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."

(29 U.S.C. 203 (f).)

Appendix E

First asterisks:

> "The fashioning of tools, the provision of fertilizer, the processing of the product, to mention only a few examples, are functions which, in some societies, are performed on the farm by farmers as part of their normal agricultural routine."

Second asterisks:

> "Tools are made by a tool manufacturer, who specializes in that kind of work and supplies them to the farmer. The compost heap is replaced by factory produced fertilizers. Power is derived from electricity and gasoline rather than supplied by the farmer's mules. Wheat is ground at the mill."

The balance of the paragraph immediately following the portion quoted by the Court:

> "The farmhand who cares for the farmer's mules or prepares his fertilizer is engaged in agriculture. But the maintenance man in a power plant and the packer in a fertilizer factory are not employed in agriculture, even if their activity is necessary to farmers and replaces work previously done by farmers. The production of power and the manufacture of fertilizer are independent productive functions, not agriculture."
>
> (337 US at pp. 760-761.)

1949

Chapter 465—Public Law 639, 80th Congress—2nd Session, U.S. Code Cong. Serv., Vol. 1, p. 419:

"Provided further, That no part of the funds appropriated in this title shall be available to organize or assist in organizing agricultural laborers or used in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers as referred to in section 2 (3) of the Act of July 5, 1935 (49 Stat. 450), and as amended by the Labor-Management Relations Act, 1949 (Public Law 101, approved June 23, 1964), and as defined in section 3(f) of the Act of June 25, 1938 (52 Stat. 1060)."

1953

Chapter 296—Public Law 170, 83rd Congress—1st Session, U.S. Code Cong. and Adm. News, p. 307:

"Provided, That no part of this appropriation shall be available to organize or assist in organizing agricultural laborers or used in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers as referred to in section 2(3) of the Act of July 5, 1935 (49 Stat. 450), and as amended by the Labor-Management Relations Act, 1947, and as defined in section 3(f) of the Act of June 25, 1938 (52 Stat. 1060), *and including in said definition employees engaged in the maintenance and operation of ditches, canals, reservoirs, and waterways when maintained or operated on a mutual, nonprofit basis and at least 95 per centum of the water stored or supplied thereby is used for farming purposes.*" (Emphasis added.)

Appendix F

NATIONAL LABOR RELATIONS ACT

Section 2(3) of the Act provides:

"The term 'employee' shall include any employee . . . but shall not include any individual employed as an agricultural laborer. . . ."

* * * * *

Appendix G

[¶ 605] Boycotts and Recognition Picketing

Sec. 704. (a) Section 8(b)(4) of the National Labor Relations Act, as amended, is amended to read as follows:

Section 8(b)

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * *

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;"

Section 8(b)(7) of the Act provides:

"(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees: (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act, (B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this sub-paragraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have

a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services. Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b)."

(6) As between Buckeye and Nulaid and the respective security that each has received from LaTorre to protect for financial assistance or financial advances made to LaTorre, each covenants and agrees that whatever security either has separately from LaTorre, this security may likewise be security to protect the other for advances made by it to LaTorre. LaTorre consents to this arrangement and agrees that whatever security LaTorre gives to Buckeye may likewise be security for advances made by Nulaid and whatever security LaTorre gives to Nulaid may likewise be security for advances made by Buckeye. It is understood that LaTorre has other poultry operations at Aromas (Watsonville), Bluff Road (Watsonville), and Boulder Creek and has real property consisting of a home place acreage in Santa Cruz County and other property located therein upon which Nulaid has a lien or liens to protect advances on projects other than Elkhorn. Nothing in this paragraph is to be construed to require Nulaid or Buckeye to share its financing protection with the other on any venture other than the Elkhorn project, the subject of this agreement. Nothing in this agreement is to be construed to prevent Buckeye from obtaining security for advances made by it to LaTorre on any of LaTorre's other operations providing the security so taken by Buckeye is subordinate to Nulaid's present security on the various LaTorre properties.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 792

MONTEREY COUNTY BUILDING & CONSTRUCTION TRADES COUNCIL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (P.A. 1–9)[1] is reported at 335 F. 2d 927. The Board's decision and order (P.A. 10–56) are reported at 142 NLRB 139.

[1] "P.A." refers to the appendix to the petition for certiorari. "Tr." refers to the stenographic transcript which was reproduced as "Volume II, Transcript of Record." "G.C. Ex." refers to exhibits of the General Counsel. Whenever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

762-195—65

JURISDICTION

The decision of the court below (P.A. 1–9) was rendered on August 18, 1964, and its judgment was entered on the same day (P.A. 57). A petition for rehearing was denied on October 1, 1964, and a decree was then entered (P.A. 58, 59–61). The petition for a writ of certiorari was filed on December 29, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether persons employed by contractors to construct and install poultry breeding buildings and equipment, on a site which will be a farm when the construction is completed, are "agricultural laborers" within the meaning of Section 2(3) of the National Labor Relations Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*), the National Labor Relations Board Appropriations Act (Title III, Act of September 22, 1961, 75 Stat. 589, 609), and of the Fair Labor Standards Act (52 Stat. 1060, 29 U.S.C. 201, *et seq.*,), are set forth at pp. 3–4 of the petition.

STATEMENT

Buckeye Incubator Company (herein called Buckeye) is a Delaware corporation doing business throughout the United States (P.A. 21; Tr. 184, 203). Buckeye has a factory at Springfield, Ohio, where it manufactures approximately 160 products for use in

the poultry industry, and where it engages in other manufacturing activities (Tr. 185). Buckeye also furnishes financing and serves as the general contractor in connection with the construction and installation of large-scale poultry-breeding operations (P.A. 21; Tr. 186). Buckeye's gross annual business exceeds $4,500,000 (P.A. 21; Tr. 207).

In July 1961, Buckeye entered into a contract with Vito La Torre to construct and install poultry raising buildings and equipment at an undeveloped site of land owned by La Torre at Watsonville, California (P.A. 23; Tr. 29, G.C. Ex. 3). La Torre and his wife are the sole stockholders of three corporations operating poultry ranches in the Watsonville area (P.A. 20–21; Tr. 22–23). Buckeye's employees, who were not union members, were to install all the poultry raising equipment at the new site, which is known as the Elkhorn Ranch (P.A. 23; Tr. 76, 198, 202). Construction of the buildings was subcontracted by Buckeye to the Jack L. Whiteside Construction Company, an employer of nonunion carpenters, plumbers, laborers, and electricians (P.A. 22, 23; Tr. 77, 307, G.C. Ex. 5). Buckeye subcontracted the exterior electrical work at the Elkhorn site to Sanders Electric Company, an employer of union labor (P.A. 22, 23; Tr. 77, 243). Grading, road construction, and the construction of drainage ditches at the Elkhorn location were contracted for directly by La Torre with the Granite Construction Company, a general engineering work concern employing union labor (P.A. 21, 23–24; Tr. 76–77, 333, G.C. Ex. 4).

Petitioner Monterey County Building & Construction Trades Council (herein called the Union) is a labor organization composed of delegates from various building trades unions (P.A. 23; Tr. 528). The operating engineers employed by Granite and the electricians employed by Sanders are members of locals that belong to the Council (P.A. 24; Tr. 76–77, 530–532). Early in September 1961, shortly after construction activity had commenced at the Elkhorn site, representatives of the Union approached Buckeye with a request that it sign the Union's standard labor agreement (P.A. 24; Tr. 223–224, 225–226, G.C. Ex. 8, 9). The terms of that agreement provided that Buckeye would recognize the Union's affiliated locals as the bargaining representative for its employees, and that it would engage only subcontractors who either employed members of the Union's constituent locals or agreed that their employees would become members of one of those locals after seven working days (P.A. 24–25; G.C. Ex. 9). Buckeye refused to sign the agreement proffered by the Union (P.A. 24; Tr. 224). The Union also approached Whiteside and requested that it sign the standard agreement (P.A. 25; Tr. 312–315). Whiteside refused, claiming that he could not afford the increased labor cost that would result from the agreement (P.A. 25; Tr. 313–314). On September 19, the Union commenced picketing at the Elkhorn Project, and the picketing continued for more than thirty days (P.A. 25–32; Tr. 77, 90–92).

The Board found that the Union violated Section 8(b)(7)(C) of the National Labor Relations Act,

since a purpose of the picketing was to force or require Buckeye and Whiteside to recognize and bargain with the Union, and the picketing had continued for more than thirty days without a representation petition having been filed (P.A. 11–12). The Board further found that, since the picketing was also designed to cause Granite and Sanders to cease doing business with La Torre, Buckeye, and Whiteside, the Union also violated Section 8(b)(4)(B), the secondary boycott provision of the Act (P.A. 13, 37–41). The Union does not contest that its picketing was for recognitional purposes, and also had the secondary object proscribed by Section 8(b)(4)(B) (Pet. 9). Instead the Union contends that the persons employed by Buckeye and Whiteside who worked at the Elkhorn site were "agricultural laborers," and were therefore excluded from the definition of "employee" contained in Section 2(3) of the Act. The Board rejected this argument on the ground that the Elkhorn Ranch was not devoted to actual farming activities during the period in question, and that the construction performed by Buckeye and Whiteside was major independent construction activity and not part of an agricultural function (P.A. 11–13). The Board ordered the Union to cease and desist from its illegal conduct (P.A. 14–15).

The court of appeals sustained the Board's unfair labor practice findings, and enforced its order. In so doing, the court affirmed the Board's determination that the employees of Buckeye and Whiteside did not fall within the agricultural exemption contained in the Act (P.A. 1–9).

ARGUMENT

The decision of the court of appeals is clearly correct and there is no conflict of decisions. Consequently, there is no occasion for further review by this Court.

The question presented is whether the persons employed by Buckeye and Whiteside on the Elkhorn Ranch were "agricultural laborers" and thus exempt from the Act. The Act does not define the terms "agricultural laborer," but riders to the National Labor Relations Board Appropriation Act have incorporated the definition of "agriculture" contained in Section 3(f) of the Fair Labor Standards Act. *E.g.*, 75 Stat. 609. As this Court pointed out in *Farmers Reservoir & Irrigation Company* v. *McComb*, 337 U.S. 755, 762, "this definition has two distinct branches." The primary meaning covers actual farming operations; the secondary meaning includes "any practices * * * performed either by a farmer or on a farm, incidently to or in conjunction with 'such' farming operations." *Id.* at 763.

The primary meaning of agriculture concerning actual farming is admittedly not involved here. As to the secondary meaning, the Board and the court of appeals found that the work performed by Buckeye and Whiteside was independent of farming activity (P.A. 7, 12). See also *Farmers Reservoir & Irrigation Co.* v. *McComb*, 337 U.S. 755, 761; *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254, 264–270; *Mitchell* v. *Budd*, 350 U.S. 473, 481, 482. While petitioner contends, to the contrary, that this work was incident to normal farming operations, it is not necessary to reach this issue since the secondary meaning is not

satisfied even if we accept that contention. In all events it is clear that Buckeye and Whiteside are not farmers, and the Board found that the work which they performed was not on a farm, for the Elkhorn site was not as yet ready for farming operations.

The Board's finding that the work was not performed on a farm is amply supported by the record. The regulations of the United States Department of Labor construing the agricultural exemption in Section 3(f) define a "farm" as "a tract of land *devoted to the actual farming activities* included in the first part of section 3(f)" (emphasis added). 29 C.F.R. 780.144; P.A. 55–56. As the Board found, the Elkhorn site, at the time of the picketing, "was still a tract of land not developed into a farm" (P.A. 12). Prior to the construction activity, it was barren, desolate property which had never been utilized as a farm. The installation of utilities at the site was not completed by the Pacific Gas and Electric Company until more than three months after September 14, when the picketing began (P.A. 12; Tr. 541–542). Moreover, the first chickens were originally scheduled for delivery on December 22, when buildings and equipment were scheduled to be available to care for them. But, because of delays occasioned by the labor dispute, completion of facilities necessary to commence the farm's operation was delayed beyond that date (Tr. 137–139). In short, the farming activity on the site, *i.e.*, the raising of poultry, did not commence until January 1962, at least three months after the picketing commenced.[2]

[2] If the Board and court of appeals erred in determining that the persons employed by Buckeye and Whiteside were not

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

ALLISON W. BROWN, JR.,
Attorney,
National Labor Relations Board.

JANUARY 1965.

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agricultural laborers and therefore not "employees" within the meaning of the Act, this would require overturning the Board's order as to Section 8(b)(7)(C) since petitioner Union would not then have been required to submit a representation petition within thirty days of the start of picketing. However, even then, the Board's conclusion that petitioner violated Section 8(b)(4)(B) would still be correct. That Section proscribes secondary activity aimed at causing a cessation of business between a neutral "person" and "any other person." It is well settled that the term "person," when used in the Act, is not limited to employers employing individuals who are statutory "employees." *Plumbers, Local 298* v. *County of Door*, 359 U.S. 354; *Local 25, International Brotherhood of Teamsters* v. *N.Y., N.H. & H. R. Co.*, 350 U.S. 155. Thus, Section 8(b)(4)(B) applies even if we assume that both the employees of Buckeye and Whiteside, the employers involved in the dispute, and those of Granite and Sanders, the neutral employers, were agricultural laborers and therefore not "employees" under the Act.

U.S. GOVERNMENT PRINTING OFFICE: 1965